

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Published Opinion No. 5371
Heard October 14, 2015 -- Filed December 9, 2015

Appellate Case No. 2014-000175
Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Petitioner

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

APPENDIX
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
REGARDING OPINION NO. 5371

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 11
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335
(Attorneys for Petitioner)

RECEIVED

FEB 23 2016

SC SUPREME COURT

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-1332

BETTY FISHER
PLAINTIFF(S)

BESSIE HUCKABEE
DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court; Plaintiff's Motion for Summary Judgment is Granted.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: Case is related to Baker v. Huckabee (2009-CP-10-3010) & this case

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2117
Judge Code

5/7/13
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-1332; 2009-CP-10-3010

BETTY FISHER
PLAINTIFF(S)

BESSIE HUCKABEE
DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Sealed); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Form 4 signed on May 7, 2013, and filed on May 8, 2013, contained the following language: "Plaintiff's Motion for Summary Judgment is Granted" (emphasis added). This was scrivener's error because the Motion for Summary Judgment was filed by the Defendant rather than the Plaintiff. The Court amends the Form 4 filed on May 8, 2013, and finds: the Defendant's Motion for Summary Judgment is Granted.

Plaintiff's Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013, filed on May 28, 2013, is scheduled for October 8, 2013, at 9:30 a.m.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

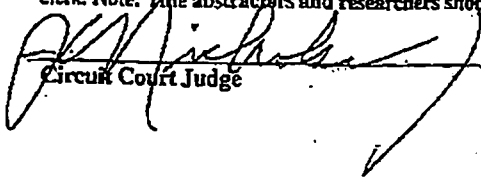
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2117
Judge Code

9/3/13
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-1332

BETTY FISHER
PLAINTIFF(S)

BESSIE HUCKABEE
DEFENDANT(S)

Submitted by: _____	Attorney for: ☐ Plaintiff ☐ Defendant
	or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See-attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

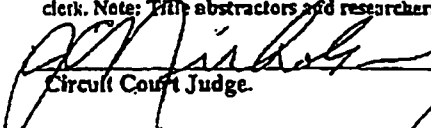
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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N/A		\$
		\$
		\$

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2117
Judge Code

12/12/13
Date

Defendants.

**ORDER AFFIRMING PRIOR ORDER
GRANTING SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS**

5. Plaintiff filed the current action on February 24, 2012, under the Charleston County Circuit Court file number 2012-CP-10-1332.

CONCLUSIONS OF LAW

"Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The evidence and inferences drawn therefrom should be viewed in the light most favorable to the nonmoving party." *Southern Contracting, Inc. v. H.C. Brown Construction Co., Inc.*, 317 S.C. 95, 450 S.E.2d 602 (Ct. App. 1994).

The Court's prior order granted summary judgment on the basis that Plaintiff lacked standing to sue on behalf of the decedent in the current action. Plaintiff argues that as a beneficiary of the decedent's estate, she is a "real representative" pursuant to South Carolina Code Annotated Section 15-5-90, which states:

Causes of action for an in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

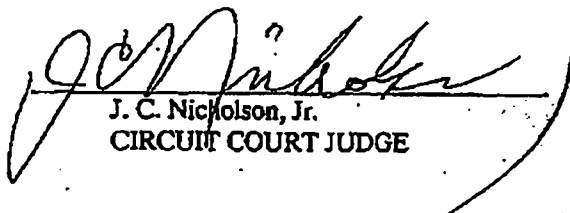
Furthermore, the Plaintiff argues that she is deemed a "real representative" based on her interpretation of a 1905 South Carolina Supreme Court case which states "'causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons,' etc. The heirs at law are the real representatives." *Duke, et al. v. Postal Telegraph Cable Co.*, 71 S.C. 95, 50 S.E. 675, 676 (1905). Plaintiff argues that she is able to bring an action under Section 15-5-90 against the Defendants because she is a real representative of the decedent's estate, rather than a personal representative, because she is a beneficiary of the decedent's estate. The Court disagrees

with Plaintiff's interpretation of a real representative. Historically, a real representative was able to bring actions "in respect to injuries and trespasses to and upon *real estate*." *Duke*, 50 S.E. at 676 (emphasis added). The Court finds that a real representative is unable to bring an action on behalf of the decedent for injuries to the person or to personal property; rather, such action must be taken through the personal representative of the estate. Though the Court is sympathetic to Plaintiff because it understands that a personal representative will not sue itself, the Plaintiff's proper remedy is through the probate court and through the removal of the personal representative. Therefore, the Court reaffirms its prior decision and finds that Plaintiff lacks standing to bring the asserted causes of action.

Therefore, the Court's order of May 8, 2013, is in **REINSTATED** and Defendant's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Date: 12/12/2013


J. C. Nicholson, Jr.
CIRCUIT COURT JUDGE

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

BETTY FISHER and LISA FISHER,)

Plaintiff,)

v.)

BESSIE HUCKABEE, et al.,)

Defendants.)

In the Matter of the Estate of
Alice Shaw-Baker:
Charleston County Probate
No.: 2009-ES-10-0378)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NOS.: 09-CP-10-3010 and
(12-CP-10-1332)

CONSENT ORDER
FOR SUBSTITUTION OF
COUNSEL

2013 OCT 14 PM 1:04
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

THIS MATTER is before this Court upon the joint motion of Peter Kouten of the Kouten Law Firm, LL and W. Westbrook Wills III, as evidenced by their signatures below, who request that the Court substitute Mr. Wills as counsel of record for the Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailaigue in the above styled case and relieving Peter Kouten as counsel for same Defendants. Based on the foregoing, and for good cause shown,

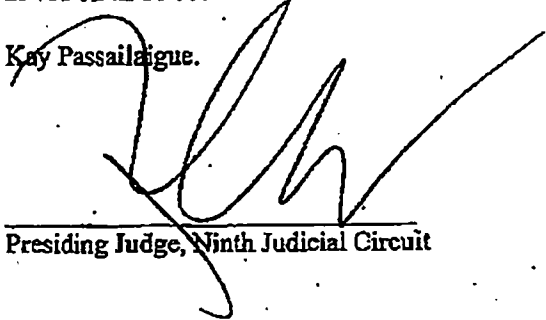
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that W. Westbrook Wills III is hereby SUBSTITUTED as counsel of record for Defendants in place of Peter Kouten. Peter Kouten is hereby relieved as counsel of record in the above-captioned matter, and W. Westbrook Wills III, of the Law Office of W. Westbrook Wills

R

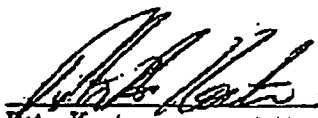
III, 38 Broad Street, Suite 200, Charleston, SC 29401 shall be sole counsel of record for
Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailaigue.

AND SO IT IS ORDERED.

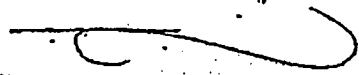
October 6, 2013
St. George, South Carolina


Presiding Judge, Ninth Judicial Circuit

WE SO MOVE:


Peter Kouten
The Kouten Law Firm LLC
P.O. Box 340a
Johns Island, SC 29457
pkouten@gmail.com

WE CONSENT:


W. Westbrook Wills III
38 Broad Street, Suite 200
Charleston, SC 29401
Tel: 843.805.6300
wwills@wwillslaw.com

CHARLESTON, SC
October 8th, 2013

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Kathryn E. Naugle,

Plaintiff,

v.

Denis R. Espinoza and Plaintiff
Finance Solutions,

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Civil Action Number: 12-CP-18-2004

CERTIFICATE OF SERVICE

FILED
OCT 14 PM 1:04
JULIE J. ARTHUR
CLERK OF COURT

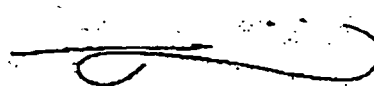
I certify that on this date a copy of the foregoing *Consent Order of Substitution of Counsel* was served on each party or counsel of record by e-mailing a copy of same, and via United States Mail with sufficient postage to the following address:

Hon. Mary Frances Jowers
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Lisa Fisher, Esq.
c/o John Hughes Cooper
(at the above address)

John Hughes Cooper, Esq.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464

Cain Denny, Esq.
Cain Denny, P.A.
PO Box 6
Sullivan's Island SC 29482


W. Westbrook Wills III

Dated: October 8th, 2013
CHARLESTON, SC

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

BETTY FISHER AND LISA FISHER

Plaintiff,

vs.

BESSIE HUCKABEE, ET AL.

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: ~~02-CP-10-301~~

(17-CP-D-1332)

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____ Other: _____		Defendant's Attorney: <u>W. Westbrook Willis III</u> _____, Bar No. <u>74681</u> Address: <u>38 Broad St Suite 200</u> <u>Charleston SC 29401</u> Phone: _____ Fax: <u>(843) 805-6300</u> E-mail: <u>WWillis@WWillisLaw.com</u>	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: ☐ YES ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. _____ Signature of Attorney for ☐ Plaintiff / ☒ Defendant October 8, 2013 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$ <u>25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty Fisher, as Real Representative for Alice Shaw-Baker, Appellant,

v.

Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants,

Of whom Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten are the Respondents.

Appellate Case No. 2014-000175

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5371
Heard October 14, 2015 – Filed December 9, 2015

AFFIRMED

John Hughes Cooper, of John Hughes Cooper, P.C., of Mount Pleasant; and Lisa Fisher, pro hac vice, for Appellant.

Peter A. Kouten, of Johns Island, pro se; and Warren W. Wills, III, of the Law Office of W. Westbrook Wills, III, of Folly Beach, for Respondents Bessie Huckabee, Kay Passailaigue, and Sandra Byrd.

WILLIAMS, J.: In this civil matter, Betty Fisher appeals the circuit court's grant of summary judgment in favor of Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten (collectively "Respondents"). Fisher argues the court erred in (1) holding she lacked standing to bring a survival action against Respondents on behalf of her deceased aunt as a "real representative"; (2) failing to find Kouten waived the issue of standing; (3) failing to find she had standing based on equitable principles of trust law; (4) failing to find South Carolina public policy supports giving her third-party standing; (5) granting summary judgment when genuine issues of material fact existed as to her claims; (6) failing to rule upon the motion to disqualify Kouten as counsel for Huckabee, Slade, and Byrd; and (7) considering trial counsel's arguments as factual contentions. We affirm.

FACTS/PROCEDURAL HISTORY

Alice Shaw-Baker died testate in Charleston County, South Carolina, at the age of 79 on February 25, 2009. Originally from San Francisco, California, Shaw-Baker enlisted in the Navy and was subsequently stationed in Charleston. After her service, Shaw-Baker worked in accounting-related jobs for several employers in the Charleston area, including Charleston Memorial Hospital for over twenty years. Shaw-Baker married and divorced twice, and she had no children.

Shaw-Baker, a passionate advocate for animals, had executed prior wills that left the vast majority of her estate to animal welfare and rescue organizations. Her prior wills also included bequests to Huckabee and Slade, who were Shaw-Baker's friends and former colleagues at Charleston Memorial Hospital. In her last will and testament, executed on May 21, 2001, Shaw-Baker devised her entire estate to Huckabee, Slade, and another former colleague, Byrd. Shaw-Baker also named Slade the sole beneficiary of her state deferred compensation plan and a life insurance policy. Further, Shaw-Baker nominated Huckabee as personal representative. Huckabee petitioned the probate court for informal probate of the will on March 11, 2009. The probate court admitted the will and appointed Huckabee as personal representative.

Shaw-Baker's closest living heir is her niece, Fisher, of Long Beach, California. On April 27, 2009, Fisher contested the will and sought removal of Huckabee as personal representative.¹ Fisher alleged Huckabee and Slade had unduly influenced Shaw-Baker by inducing her to execute the May 21, 2001 will naming

¹ The will contest is still pending in the probate court.

them the sole beneficiaries of the entire estate—with the exception of a \$4,000 bequest to Byrd—in exchange for the promise they would provide care for Shaw-Baker such that she could avoid being placed in an assisted living facility. Fisher alleged that, despite their promise, Huckabee and Slade failed to provide adequate care for Shaw-Baker, allowing her health and home to deteriorate to the point that her grand-niece was appointed as her guardian-conservator in her last year of life. Fisher also alleged Kouten, Shaw-Baker's court-appointed guardian ad litem and attorney, acted contrary to Shaw-Baker's interests and failed to exercise reasonable care in advising her on conservator and estate matters.

Based on these allegations, Fisher filed the instant lawsuit in circuit court on February 23, 2012, as Shaw-Baker's "real representative" under the survivability statute.² In her complaint, Fisher requested damages and attorney's fees, bringing causes of action against all Respondents for, *inter alia*, violation of the Omnibus Adult Protection Act³ and breach of fiduciary duty. Additionally, Fisher asserted a legal malpractice claim against Kouten.

Respondents filed a motion for summary judgment on December 17, 2012, claiming Fisher—as Shaw-Baker's real representative—lacked standing to bring this action. The circuit court granted Respondents' motion in a Form 4 order issued on May 8, 2013.⁴ Fisher filed a motion to alter or amend judgment on May 28, 2013.

In its December 12, 2013 order, the circuit court denied Fisher's motion to alter or amend and affirmed its prior order granting Respondents' motion for summary judgment. The court held a real representative could not sue on behalf of a decedent for injuries to his person or personal property under the survivability statute. Noting a real representative historically was only able to bring actions related to the decedent's real estate, the court found only a personal representative could bring those actions. Accordingly, the court concluded Fisher's only remedy was to seek removal of Huckabee as personal representative in probate court. This appeal followed.

² See S.C. Code Ann. § 15-5-90 (2005).

³ S.C. Code Ann. §§ 43-35-5 through -595 (2015).

⁴ The circuit court made a scrivener's error in this order by granting summary judgment to Fisher. The court corrected this mistake in a September 3, 2013 order, in which it granted summary judgment to Respondents.

STANDARD OF REVIEW

"An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court." *Columbia/CSA–HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

LAW/ANALYSIS

I. Standing as "Real Representative"

Fisher contends the circuit court erred in finding she lacked standing to bring personal causes of action on behalf of Shaw-Baker as her "real representative" under the survivability statute. According to Fisher, because Huckabee—Shaw-Baker's personal representative—will not conceivably sue herself and the other Respondents, Fisher may bring this action as Shaw-Baker's real representative. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The [General Assembly]'s intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003)). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose." *Id.* "The construing court may additionally look to the legislative history when determining the legislative intent." *Id.*

Section 15-5-90 of the South Carolina Code (2005) provides the following:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person

Because the language in section 15-5-90 is broad and does not explicitly state which causes of action survive to the personal or real representative, we look to the legislative intent behind this statute to resolve the question of whether Fisher may bring this action on behalf of Shaw-Baker. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (explaining "the [survivability] statute's language is broad and ostensibly appears to include almost every conceivable cause of action" with few exceptions).⁵

"At common law, a personal action *ex delicto* did not survive the death of either party." *Id.* at 564, 564 S.E.2d at 97. In 1859, the General Assembly passed a wrongful death statute, a version of Lord Campbell's Act in England, that provided a cause of action against a defendant who wrongfully killed a decedent for the benefit of certain family members. Act No. 4480, 1859 S.C. Acts 825–26; *see also* Robert L. Wynn, III, Note, *Death of the Head of the Family—Elements of Damages Under South Carolina's Lord Campbell's Act*, 19 S.C. L. REV. 220, 220–21 (1967) (providing a history of wrongful death and survival actions in South Carolina). The General Assembly also enacted the first survivability statute in 1892, stating that "causes of action for and in respect to any and all injuries and trespasses to and upon *real estate* shall survive both to and against the personal or real representative (as the case may be) of deceased persons." Act No. 15, 1892 S.C. Acts 18 (emphasis added). Our supreme court later held the wrongful death statute did not provide for the survival of a decedent's cause of action for personal injuries suffered prior to death for the benefit of his estate. *In re Estate of Mayo*, 60 S.C. 401, 413–14, 38 S.E. 634, 637–38 (1901). Therefore, in 1905, the General Assembly amended the survivability statute—which initially covered only real property—and inserted the words "and any and all injuries to the person or to personal property" after the words "real estate." Act No. 471, 1905 S.C. Acts 945; *see also Grainger v. Greenville, Spartanburg & Anderson Ry. Co.*, 101 S.C. 399,

⁵ We note that some, if not all, of Fisher's causes of action include allegations of fraud and deceit, both of which are well-recognized common law exceptions to the survivability statute. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. Therefore, even if Fisher had standing, she could not bring these actions on Shaw-Baker's behalf under the statute.

403, 85 S.E. 968, 969 (1915) (noting the legislative intent behind the amendment). The 1905 change is reflected in the current survivability statute. See § 15-5-90.

At common law, real and personal property were two distinct "species" during the administration of an estate. *Hull v. Hull*, 24 S.C. Eq. (3 Rich. Eq.) 65, 91 (1850). Title to a decedent's real property passed directly to his intestate heirs at law or devisees. *Id.* Thus, those individuals succeeding to the real property stood in the place of the decedent in regard to his affairs concerning the land and were sometimes called the "real representatives." 33 C.J.S. *Executors and Administrators* § 2 (2009).

Legal title to the decedent's personal property vested upon his death with his executor or administrator, otherwise referred to as the "personal representative." *Hull*, 24 S.C. Eq. at 91. A testator, however, could devise title to his real property to his personal representative and direct him to sell it to pay off estate debts or distribute the sale proceeds to his legatees. See S.C. Code of 1902 § 2600 (Civ. Code); *Hull*, 24 S.C. Eq. at 91. Therefore, a real or personal representative, but not both, could be vested with title in the decedent's real property. See *Hull*, 24 S.C. Eq. at 91 ("If [real property] is devised, unless devised to the executor, or power is given to him to dispose of it, [the executor] has no power to interfere with it, and the devisee takes it without his assent.").

The dichotomy between a personal and real representative is reflected in the 1892 Act. The General Assembly established the right to pursue survival actions involving a decedent's real estate to the "personal or real representative (as the case may be)." Act No. 15, 1892 S.C. Acts 18. The use of the words "as the case may be" demonstrates the General Assembly intended that either the personal or real representative could pursue a survival action, depending on how the title in real property vested upon the decedent's death. If the title vested to a testator's personal representative, then he would be the proper individual to bring a suit for injuries or trespass to the land as its legal owner. See Act No. 15, 1892 S.C. Acts 18. If, on the other hand, the title vested in an heir at law or devisee, then he could bring an action on behalf of the decedent as the real representative. See Act No. 15, 1892 S.C. Acts 18; see also, e.g., *Duke v. Postal Tel. Cable Co.*, 71 S.C. 95, 98-99, 50 S.E. 675, 676 (1905) (holding the decedent's intestate heirs are real representatives under the Act). After the 1905 amendment, the General Assembly expanded a personal representative's power in survival suits, allowing that person to also bring actions regarding injuries to the decedent's person or personal property, while a real representative remained constrained to actions related to injury or trespass to the decedent's real property. See *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97

S.C. 27, 29, 81 S.E. 189, 189 (1914) (concluding the 1905 amendment "provides, among other things, that causes of action for and in respect to 'any and all injuries to the person' shall survive to the *personal representative* of the deceased" (emphasis added)); *id.* at 30, 81 S.E. at 189 (stating the recovery, if any, in a personal survival action goes to the decedent's personal representative to hold as assets of the estate). Therefore, based on the legislative history of the survivability statute, we find the "real representative"—a decedent's intestate heir or devisee of his real property—is a remnant of the 1892 Act and only continued to have standing after the 1905 amendment in survival actions involving trespass or injury to the decedent's real estate.

In addition to the legislative history of the survivability statute, we find the current version of the South Carolina Probate Code lends support to our conclusion that a real representative has no role in a survival suit for injuries to the decedent's person. In 1986, the General Assembly enacted a modified version of the Uniform Probate Code that modernized and made sweeping changes to the state's antiquated probate law on which the survivability statute was based. Act No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C. Code Ann. §§ 62-1-100 through -7-1106 (Supp. 2014)); *see also generally* S. Alan Medlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C. L. REV. 611 (1987) (discussing the substantive changes made to South Carolina probate law). Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate. *See* S.C. Code Ann. §§ 62-3-701 through -721 (Supp. 2014). The personal representative, for example, is afforded the same standing to sue that the decedent had immediately prior to death. S.C. Code Ann. § 62-3-703(c) (Supp. 2014). The personal representative also may prosecute and defend against claims for the protection of the estate. S.C. Code Ann. § 62-3-715(20) (Supp. 2014). Most importantly, for purposes of this case, the personal representative retains authority to compromise and settle suits for "pain and suffering[,] or both, and all claims and actions based on causes of actions surviving, to personal representatives, arising, asserted, or brought under or by virtue of any statute or act of this State." *Id.* § 62-3-715(24). The real representative, on the other hand, is mentioned nowhere in the modern Probate Code.

Nevertheless, in the instant case, Fisher argues specific language in *Duke* supports her contention that she may bring a survival action for any cause of action as Shaw-Baker's real representative. In *Duke*, the circuit court dismissed a landowner's action for damages against a telegraph company when it constructed a

telegraph line through his land without a permit in 1903. 71 S.C. at 96–97, 50 S.E. at 675. The landowner died intestate that same year, leaving his wife and children as heirs. *Id.* at 97, 50 S.E. at 675. His wife and children brought a subsequent action against the defendant telegraph company for the construction of the telegraph line, and a jury returned a verdict in their favor. *Id.* at 97–98, 50 S.E. at 675–76.

On appeal, the telegraph company argued the heirs had no standing to bring the action on behalf of the deceased landowner. *Id.* at 98, 50 S.E. at 676. Our supreme court disagreed and held the heirs had a right to sue under the survivability statute. *Id.* Specifically, the court noted the following:

[T]he right to sue is conferred by sec[tion] 2859 of the Code of Laws [of 1902], which provides that "causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons" *The heirs at law are the real representatives.*

Id. at 98–99, 50 S.E. at 676 (emphasis added).

Relying upon *Duke*, Fisher claims she is a real representative because she is Shaw-Baker's heir at law. In *Duke*, the decedent's intestate heirs succeeding to his real property brought the action for injury and trespass to his land under the 1892 Act.⁶ As heirs at law who succeeded to his real estate, the decedent's wife and children were the proper real representatives to bring a survival action on his behalf. *See* 33 C.J.S. *Executors and Administrators* § 2 (2009). In the present case, however, Shaw-Baker died testate, and the probate court appointed a personal representative to manage the estate. As discussed above, although Fisher desires to bring personal causes of action on behalf of Shaw-Baker, we find these actions may only be properly pursued by the personal representative. *See Bennett*, 97 S.C. at 29, 81 S.E. at 189.

Based on the foregoing, we hold the circuit court properly granted Respondents' motion for summary judgment because Fisher lacked standing to bring a survival action against them as Shaw-Baker's real representative.

⁶ The opinion in *Duke* was filed only seven days after the General Assembly passed the 1905 amendment.

II. Unpreserved Issues

Fisher argues Kouten waived the issue of standing by failing to identify himself as a moving party in his motion for summary judgment. Fisher also asserts she has standing to bring the survival action under equitable principles of trust law. We find these issues are not preserved for appellate review because they were not properly raised to and ruled upon by the circuit court. See *Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

III. Remaining Issues

Because our finding that Fisher lacked standing is dispositive in this case, we decline to address the remaining issues on appeal. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we hold a real representative does not have standing to bring personal actions on behalf of a decedent.⁷ Accordingly, the circuit court's grant of summary judgment in favor of Respondents is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

⁷ The instant case does not present the occasion for us to determine whether a real representative continues to have standing to pursue a survival action based on trespass or injury to a decedent's real property after the enactment of the South Carolina Probate Code.

The South Carolina Court of Appeals

Betty Fisher, as Real Representative for Alice Shaw-Baker, Appellant,

v.

Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants,

Of whom Bessie Huckabee, Kay Passailaigue Slade, Sandra Byrd, and Peter Kouten are the Respondents.

Appellate Case No. 2014-000175

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff J.

N. B. W. J.

Paul C. Thomas J.

Columbia, South Carolina

FILED

January 21, 2016

cc:

John Hughes Cooper, Esquire

Warren W. Wills, III, Esquire

Peter A. Kouten, Esquire

Lisa Fisher, Esquire

The Honorable J. C. Nicholson, Jr.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION 2012-CP-10-1332

Betty Fisher, as)
Real Representative for)
Alice Shaw-Baker,)

Plaintiff,)

vs.)

Bessie Huckabee,)
Kay Passailaigue Slade,)
Sandra Byrd,)
Peter Kouten, and)
DOES 1 through 100,)

Defendants.)

VERIFIED COMPLAINT

(Jury Trial Demanded)

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CLERK OF COURT
BY

COMES NOW Betty Fisher, as Real Representative for
Alice Shaw-Baker, Plaintiff in the above-captioned action,
complaining of Defendants, and shows this honorable Court as
follows:

Parties

1. This matter is regarding Alice Shaw-Baker (decedent or "Ms. Shaw-Baker"), who died February 25, 2009, in the County of Charleston, South Carolina. At the time of her death, Ms. Shaw-Baker was a citizen of South Carolina and a resident of Charleston County.
2. Ms. Shaw Baker was a vulnerable adult under the Omnibus Adult Protection Act, S.C. Code Ann. §43-35-5 et seq.
3. Plaintiff Betty Fisher is Ms. Shaw-Baker's niece, her next-of-kin, an heir at law, and is the real representative

of Ms. Shaw-Baker's estate. Betty Fisher is a California resident ("Plaintiff").

4. Defendant Bessie Huckabee ("Defendant Huckabee") was the named agent in fact, under a General Durable Power of Attorney, executed on April 5, 1996. She was also the named agent in fact, under a Durable Power of Attorney for Health Care, executed on April 5, 1996. She also had a longstanding confidential and fiduciary relationship with Ms. Shaw Baker. On information and belief, she is a resident of Charleston County, South Carolina.

5. Defendant Kay Passailaigue Slade ("Defendant Slade") represented herself to Ms. Shaw Baker as the owner and operator of an animal rescue organization. These statements were false. Her representations caused Ms. Shaw-Baker to repose trust and confidence in Slade. This too established a longstanding confidential and fiduciary relationship with Ms. Shaw-Baker. On information and belief, Defendant Slade is a resident of Charleston County, South Carolina.

6. Defendant Sandra Byrd ("Defendant Byrd"), individually and acting as agent, co-conspirator, co-schemer, or joint venturer took advantage of Alice Shaw Baker, and assisted co-defendants of their deceit and exploitation of Ms. Shaw Baker by encouraging, ratifying, and falsifying information provided to Ms. Shaw Baker. Defendant Byrd acted in concert by notarizing documents for the benefit of co-defendants. Said action precluded Ms. Shaw Baker from getting independent advice and substituted the wishes of defendants on her. Defendant Byrd had a confidential relationship, wherein she was reposed with the trust and confidence of Ms. Shaw Baker. On information and belief, Defendant Byrd is a resident of Charleston County, South Carolina.

7. Defendant Bessie Huckabee was the named executor in the contested May 21, 2001 will, and the previously revoked 1996 and 1993 wills. Plaintiff alleges that the scheme engaged in by all defendants to gain control and ownership of Ms. Shaw Baker's property was part of a scheme and exploitation of her as a vulnerable adult. Plaintiff also asserts that the wills were revoked.

8. Defendant Kay Passailaigue Slade is a devisee under Ms. Shaw-Baker's contested and revoked May 21, 2001 will, as is Defendant Byrd. This is subject to litigation in case no. 2009-ES-10-0378. ("Will contest"). The issues filed in this litigation deal with the tort actions that the Defendants engaged in against the decedent Alice Shaw-Baker, and are not related to the relief sought in the "Will contest".

9. In or about August 2008, due to the actions of all defendants herein, Ms. Shaw Baker was placed under a conservatorship in the case entitled Conservatorship of Alice Shaw Baker, Case no. 2008-GC-10-088 ("Conservatorship case"). She was conserved without notification to any family members, however Defendants were key and knew about the events leading to the conservatorship, knew of the family, knew of Defendants' promises and obligations, and refused to act and/or contact family to assist Ms. Shaw Baker prior to the intervention of the court. These actions caused Ms. Shaw Baker to suffer severe emotional distress and harm.

10. Defendant Peter Kouten ("Defendant Kouten") was the court appointed attorney and guardian ad litem for Alice Shaw Baker in the "Conservatorship case". He remained as Alice Shaw Baker's counsel and guardian ad litem until her death on February 25, 2009. He had a continuing duty to her

estate which plaintiff alleges he has breached as set forth herein.

11. During the period of time of his representation of Ms. Shaw Baker, he concurrently represented Bessie Huckabee and Kay Slade and Sandra Byrd. This representation was contrary to the best interests of Alice Shaw Baker, and contrary to the Rules of Professional Conduct, including but not limited to the rules governing conflict of interest, zealous advocacy, and duty of loyalty. (See. S.C. Rules 1.3, 1.6, 1.7, 1.8, 1.9, 1.14, 1.16, 3.3; 3.4, 3.5.)

12. Additionally, as a result of the agency and/or corporate or other relationship between and among the Defendants and each of them, including DOES 1 through 100, inclusive (collectively, "Defendants"), each Defendant herein had or was imputed with actual knowledge, constructive knowledge, collective knowledge, and/or constructive notice of the acts and omissions of each of the other Defendants. In performing or condoning the acts and omissions as alleged herein, Defendants and each of them aided, abetted, and or caused or contributed to the wrongful acts and omissions of each of the other Defendants. Further, at all relevant times, Defendants and each of them advised, encouraged, ratified, condoned, cajoled, directed and commanded the conduct as alleged herein of each of the other Defendants.

Jurisdiction and Venue

13. This Court has jurisdiction and venue to hear and determine this matter which relates to where the cause of action arose and where the property is located, under the

jurisdiction of the Circuit Court for Charleston County, South Carolina, under the general jurisdiction of the court.

Background

14. Ms. Shaw-Baker was born August 14, 1929 in San Francisco, California.

15. Ms. Shaw-Baker's most closely related family member is her niece, Plaintiff Betty Fisher, a resident of Long Beach, California.

16. Ms. Shaw-Baker twice married briefly then divorced.

17. Ms. Shaw-Baker had no children.

18. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina.

19. After her Navy enlistment, Ms. Shaw-Baker did accounting-related work in Charleston, SC, for various employers.

20. Ms. Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement. Plaintiff is informed and believes that Defendants Hückabee, Slade, and Byrd worked for Ms. Shaw Baker at Charleston Memorial Hospital, and used their working relationship with Ms. Shaw Baker to gain information about her private life, her finances, and her estate plan. Further, that defendants used this information to gain control over Ms. Shaw Baker's mind and her will, and to interfere with the known estate plan that Ms. Shaw Baker had established for the benefit and protection of animals.

21. While working at Charleston Memorial Hospital, Ms. Shaw-Baker accumulated deferred compensation through the South Carolina Deferred Compensation Program ("Deferred Compensation").
22. Ms. Shaw-Baker obtained a life insurance policy through National Life, policy number 1424341 ("Life Insurance").
23. Ms. Shaw-Baker owned several Chihuahuas, which were show dogs. She cared for, trained, and loved them for many years prior to their deaths within the last few years of her life. Her last Chihuahua died in 2008.
24. Ms. Shaw-Baker's home was decorated with Chihuahua collectibles and heirlooms, such as figurines, stuffed animals, and art. Many of these items were given to her by her family. As many families maintain photos of their loved ones, Ms. Shaw Baker had multiple photo albums with pictures of her animals, demonstrating her commitment to their care, well being, and happiness.
25. Ms. Shaw-Baker had a long standing relationship with charitable organizations, her church, and animal rescue projects, animal welfare, and other activities for the protection of animals. Her commitment and devotion to animals was known throughout and within the community and to all who personally knew her.
26. During her years working at Charleston Memorial Hospital, Ms. Shaw-Baker began to place considerable trust and confidence in the employees she supervised and/or worked with, Defendants Bessie Huckabee and Kay Passailaigue Slade and Sandra Byrd.

27. Huckabee and Slade developed relationships with Ms. Shaw-Baker in which she placed complete trust and confidence.
28. Defendant Slade had represented that she was the owner and operator of an animal rescue charity.
29. On January 7, 1993, Ms. Shaw-Baker executed a will leaving the majority of her estate to Pet Helpers, Inc., or, if it no longer existed, the John Ancrum Chapter of the Society for Prevention of Cruelty to Animals ("1993 Will").
30. Ms. Shaw-Baker's 1993 Will made certain bequests of her personal property and left \$8,000 to Huckabee, \$12,000 to Slade conditioned on Slade's caring for Ms. Shaw-Baker's dogs, and so forth, and the remainder of her estate to Pet Helpers, Inc., or, if it no longer existed, to the John Ancrum Chapter of the Society for Prevention of Cruelty to Animals ("John Ancrum SPCA").
31. On April 5, 1996, Ms. Shaw-Baker executed another will leaving the majority of her estate to the John Ancrum SPCA ("1996 Will").
32. Ms. Shaw-Baker's 1996 Will made certain bequests of personal property and left \$12,000 to Slade for the care of Ms. Shaw-Baker's pets.
33. Ms. Shaw-Baker originally made the John Ancrum SPCA the beneficiary of her Deferred Compensation.
34. Ms. Shaw-Baker originally made the SPCA the beneficiary of her Life Insurance.
35. Ms. Shaw-Baker became concerned about what would happen to her as she aged and in the event that she was unable to take care of herself.

36. On April 5, 1996, the same day she executed her 1996 will, Ms. Shaw-Baker executed a General Durable Power of Attorney making Huckabee her attorney-in-fact.
37. Ms. Shaw-Baker's 1996 Durable Power of Attorney expressly created a fiduciary relationship between herself and Huckabee and prohibited Huckabee from using its powers to benefit herself.
38. Also on April 5, 1996, Ms. Shaw-Baker executed a Health Care Power of Attorney making Huckabee her health care attorney-in-fact with Slade as the alternate.
39. Among other provisions, the Health Care Power of Attorney authorized hiring and firing of medical, social service, and other support personnel for Ms. Shaw-Baker's care.
40. Defendants Huckabee and Slade, having developed relationships with Ms. Shaw-Baker (in which Ms. Shaw-Baker placed trust and confidence in them) exerted undue influence on her to change her will and her Deferred Compensation and Life Insurance beneficiary designations to remove the animal charities and make Huckabee and Slade the primary beneficiaries.
41. To induce Ms. Shaw-Baker to change her will and Deferred Compensation and Life Insurance beneficiary designations, Huckabee and Slade represented to Ms. Shaw-Baker that, as Ms. Shaw-Baker aged, if she was unable to provide care for herself, they would provide care for her and help Ms. Shaw-Baker stay in her home and avoid placement in an assisted living facility. They consented and agreed to help Ms. Shaw Baker.

42. But, at the time Defendants Huckabee and Slade made said representations, they had no intention of performing them.

43. As further inducement, Slade further represented to Ms. Shaw-Baker that, if Ms. Shaw-Baker willed money to her and left money to her from her Deferred Compensation and Life Insurance, Slade would ensure that her monies went directly to animal welfare and rescue projects only!

44. However, at the time Slade made said representation, she had no intention of performing them.

45. In reliance on the aforesaid false representations of Huckabee and Slade, and under the undue influence by them, Ms. Shaw-Baker executed a will on May 21, 2001 making Huckabee and Slade, other than a \$4,000 devise to Sandra Byrd, her sole beneficiaries.

46. Huckabee and Slade substituted their own wishes for Ms. Shaw-Baker's in her May 21, 2001 will. Plaintiff is informed and believes that Defendant Huckabee introduced Slade to Ms. Shaw Baker as owning animal rescues. They used these false representations to gain her life's work, home, monies, goods, bank accounts, and all things a life time of work and investments gain.

47. In further reliance on the aforesaid false representations, and under the undue influence of Huckabee and Slade, Ms. Shaw-Baker purportedly made Slade the sole beneficiary of her Deferred Compensation Plan.

48. In further reliance on the aforesaid false representations and under the undue influence of Huckabee and Slade, Ms. Shaw-Baker purportedly made Slade the sole beneficiary of her Life Insurance proceeds.

49. By late 2007, Ms. Shaw-Baker's residence had become cluttered, she was hoarding junk mail and small items associated with Chihuahua dogs, and she likely was not maintaining adequate hygiene or nutrition.

50. Despite their representations on which Ms. Shaw-Baker relied in executing her contested May 21, 2001 Will, and in changing her beneficiary designations for her Deferred Compensation and Life Insurance, Huckabee and Slade did not provide care for Ms. Shaw-Baker to ensure that she had a livable home, adequate food, or proper hygiene.

51. On information and belief, in 2007, Ms. Shaw-Baker requested beneficiary designation forms for her Deferred Compensation Program in an attempt to remove Slade as her beneficiary.

52. On July 31, 2008, a representative of the Charleston Police Department's Elder Support Line filed a Petition for a Finding of Incapacity and for Appointment of a Guardian and Conservator for Ms. Shaw-Baker.

53. On August 4, 2008, the Probate Court appointed Temporary Guardians.

54. Temporary Co-Guardian stated her intention to remove Ms. Shaw-Baker from her home and place her in an assisted living facility.

55. Despite the representations Huckabee and Slade made to induce Ms. Shaw-Baker to execute her contested May 21, 2001 Will and to change the beneficiary designations for her Deferred Compensation and Life Insurance, they refused to provide assistance to ensure that Ms. Shaw-Baker received adequate care when she became incapacitated and they refused

to assist her with staying in her home and with avoiding placement in an assisted-living facility.

56. After discovering the plight of Ms. Shaw-Baker, her niece, Plaintiff Betty Fisher, and her great-niece, Lisa Fisher, an attorney, traveled to Charleston, South Carolina, from California to assist Ms. Shaw-Baker.

57. Ms. Shaw-Baker's family members requested that Huckabee and Slade assist Ms. Shaw-Baker, but they refused.

58. On information and belief, during this period, Huckabee and Slade even refused to visit Ms. Shaw-Baker.

59. Both Huckabee and Slade had failed to disclose Ms. Shaw-Baker's condition to her family or authorities.

60. On September 8, 2008, Lisa Fisher, Esquire filed a Motion for Relief to prevent Ms. Shaw-Baker from being removed from her home.

61. On September 16, 2008, Lisa Fisher was appointed Ms. Shaw-Baker's Temporary Co-Guardian.

62. While Temporary Co-Guardian, Lisa Fisher fulfilled the Probate Court's directives to have Ms. Shaw-Baker's house cleaned, organized, and renovated and to make arrangements for caretakers to supervise Ms. Shaw-Baker's daily meals, hygiene, and medical needs.

63. On information and belief, despite their aforesaid representations, behind the scenes, Huckabee and Slade promoted Ms. Shaw-Baker's placement in an assisted living facility and took no efforts to help her stay in her home.

64. On October 29, 2008, Lisa Fisher was appointed Ms. Shaw-Baker's Guardian and Conservator.

65. Among other determinations, in its Order, the Probate Court found that Ms. Shaw-Baker had capacity to nominate Lisa Fisher as her Guardian and Conservator, to consent to conservatorship, to make purchases up to \$50 per day, and to vote.

66. On information and belief, Ms. Shaw-Baker executed a will subsequent to the May 21, 2001 will revoking the May 21, 2001 will ("Subsequent Will").

67. The location of the Subsequent Will was not known.

68. Ms. Shaw-Baker instructed Lisa Fisher, as her Guardian and Conservator, to revoke Ms. Shaw-Baker's May 21, 2001 Will.

69. Ms. Shaw-Baker became hospitalized to regulate her medication.

70. On February 25, 2009, Ms. Shaw-Baker died in the hospital.

71. Within moments of Ms. Shaw-Baker's death, Huckabee and her agents rushed to Ms. Shaw-Baker's house. Her agents obtained the keys to Ms. Shaw-Baker's house by falsely representing to the caretaker that Huckabee was entitled to the keys.

72. On information and belief, shortly after Ms. Shaw-Baker's death, Huckabee entered Ms. Shaw-Baker's house.

73. On information and belief, Huckabee sought to locate the Subsequent Will while at the house.

74. Huckabee and Slade had a motive and an opportunity to destroy the Subsequent Will.

75. After Ms. Shaw-Baker's death, on information and belief, a partially-preserved digital draft of her will was

found on a computer at the same law firm that drafted Ms. Shaw-Baker's contested May 21, 2001 will. Based information from a law firm employee, it was saved in 2001, and it named beneficiaries other than Huckabee and Slade, including family members such as Plaintiff Betty Fisher.

FIRST CAUSE OF ACTION

[VIOLATION OF OMNIBUS ADULT PROTECTION ACT,

S.C. ANN. CODE § 43-35-5 et seq.]

As To Plaintiff Against All Defendants

76. Plaintiffs reassert the foregoing allegations as if set forth herein verbatim.

77. The herein-above stated conduct of Defendants, including DOES 1 through 100, inclusive, was in violation of the Omnibus Adult Protection Act which is set forth in S.C. Ann. Code § 43-35-5 et seq. The decedent Alice Shaw Baker was the intended beneficiary of Omnibus Adult Protection Act which provides relief for vulnerable adults, individually and by and through their successors in interest.

78. The decedent Alice Shaw Baker was a "vulnerable adult" within the meaning of S.C. Ann. Code § 43-35-10, (11), because she was "a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities

of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction."

79. Ms. Shaw Baker was abused by Defendants, and their agents, and co-conspirators, including but not limited to Defendant Peter Kouten, including DOES 1 through 100, inclusive, pursuant to that Statute, subsection 10 for psychological abuse, where they deliberately subjected Alice Shaw Baker, a vulnerable adult to threats, harassment, and betrayal through intimidating behavior causing Ms. Shaw Baker to be in fear of her ability to remain in her home, her ability to obtain hospital services, and her desire that all of her monies be used for charitable purposes.

80. These defendants caused Ms. Shaw Baker to experience "fear, humiliation, degradation, agitation, confusion, and other forms of serious emotional distress" as Defendant Huckabee conspired with the caregivers Denise Ferguson and Kathryn Magwood to obtain personal property and papers from Ms. Shaw Baker's home.

81. Further, these defendants caused Ms. Shaw Baker to experience fear, agitation, and confusion when they contacted Defendant Peter Kouten while Ms. Shaw Baker was hospitalized and inquired about their ability to control and take possession of her personal and real property.

82. On information and belief, Defendants further caused Ms. Shaw Baker psychological harm when they engaged Denise Ferguson and Kathryn Magwood to act on behalf of Defendants rather than perform their duties as caregivers to Ms. Shaw Baker. When these individuals were thereafter fired for their betrayal and acts below the standard of care, defendants further utilized Ferguson and Magwood and others

to interfere with the appropriate treatment and health services of the sitters and nurses in the hospital setting.

83. Also, Defendants Huckabee, Slade, individually, and by and through their agents, caused Ms. Shaw Baker psychological damage as they urged her to "go to her dogs" while she was in the hospital, and talked about the intentional and improper transfer of her real and personal property to Defendant Kay Passailaigue Slade. These statements were known to be contrary to the desires, express and implied wishes of the decedent, and in direct contravention to the promises previously made by Defendants to protect and properly distribute the real and personal property of Ms. Shaw Baker to the benefit of animal charities.

84. Defendant Huckabee intentionally interfered with the calm atmosphere in Ms. Shaw Baker's room at the hospital prior to her death. She made loud telephone calls, asserting her authority and control, causing Ms. Shaw Baker anxiety and fear, and obtaining legal advice from Defendant Peter Kouten during these calls, contrary to his ethical obligations to Ms. Shaw Baker.

85. On information and belief, defendant Huckabee misrepresented herself as agent in fact at the hospital, despite the knowledge that the court had revoked the power of attorney and appointed Lisa Fisher, Esquire, as conservator and guardian, with all rights and powers to advise the hospital of the medical course of conduct. Said misrepresentations caused Ms. Shaw Baker to be placed on DNR status without notice to Ms. Fisher.

86. Plaintiff is informed and believes that Defendant Huckabee improperly exploited Ms. Shaw Baker by her

improper use of the power of attorney for the advantage of Defendants, Huckabee, Slade, Kouten, and Does 1 through 100 and against the wishes of Ms. Shaw Baker.

87. Despite their promises and representations that Defendants made to Ms. Shaw Baker during her life, Defendants Huckabee and Slade refused to "provide the care, goods, or services necessary to maintain" Ms. Shaw Baker's health and safety, including but not limited to, food, clothing, medicine, shelter, supervision, and medical services.

88. Instead, they used their relationship with Ms. Shaw Baker to obtain her money, goods and home through their exploitation of her and their false representations. Their further betrayal included the use of their agents, Ferguson, Magwood, and Kouten, to obtain Ms. Shaw Baker's personal and real property. Said actions were done with the intent to conceal and confiscate Ms. Shaw Baker's lifeworks.

89. Defendants failure to provide these services to Ms. Shaw Baker presented a substantial risk, and caused her to suffer physical and mental injuries. Ms. Shaw Baker was forced to live in substandard conditions, which caused and contributed to the loss of her dogs, deprived her of appropriate medical services and proper supervision, and ultimately led to her early demise.

90. Further, Defendants' neglect led to the imposition of the involuntary conservatorship, fear of institutionalization, and led to her living in an isolated state. It also led to the unnecessary payment of conservatorship fees, attorney fees, and costs related to the conservatorship. These fees and costs constitute damages suffered by Ms. Shaw Baker.

91. Also, Defendants failure to assist Ms. Shaw Baker when it became evident that she needed assistance to provide for her own health and safety, led to her being deprived of her family and support of those who loved her.

92. The purpose of the Omnibus Adult Protection Act which is set forth in S.C. Ann. Code § 43-35-5 et seq. is to protect a particularly vulnerable portion of the population, of which Ms. Shaw Baker was a member. During the entire period that the alleged acts and omissions took place, Ms. Shaw Baker was subject to the provisions of the Omnibus Adult Protection Act, and its provisions against the abuse, neglect, and exploitation she was subjected to.

93. By virtue of the herein-above described acts and omissions, Defendants, their agents, co-conspirators, as caregivers, including DOES 1 through 100, inclusive, abused the decedent Alice Shaw Baker, when they neglected her, abandoned her, otherwise deprived her of goods or services, and medical and psychological help that were necessary to avoid physical harm and mental suffering.

94. By virtue of the herein-above described acts and omissions, Defendants acted with recklessness, oppression, fraud, and malice in the commission of this abuse within the meaning of Omnibus Adult Protection Act, and plaintiff is thereby entitled to recover punitive damages.

95. As a result of the alleged acts and omissions, the decedent, Ms. Shaw Baker, incurred damages for pain and suffering.

96. As a sole, direct and proximate result of the above described conduct of Defendants, the decedent was injured and hurt in her health, strength and activity, sustaining

serious personal injuries to her body and suffering extreme emotional distress and mental anguish.

97. As a further, direct and proximate result of the injuries sustained as a sole, direct and proximate result of the above-described conduct of the Defendants, Ms. Shaw Baker suffered severe pain, suffering, fear, and anguish in connection therewith, all to her further general and non-economic damages.

SECOND CAUSE OF ACTION

[BREACH OF FIDUCIARY DUTY.]

As To Plaintiff Against All Defendants

98. Plaintiff reasserts the foregoing allegations as if set forth herein verbatim.

99. Defendants had formed fiduciary relationships with and owed fiduciary duties to Ms. Shaw-Baker.

100. At all material times, Huckabee had an express fiduciary relationship to Ms. Shaw-Baker per Ms. Shaw-Baker's April 5, 1996 General Durable Power of Attorney.

101. At all material times, Slade had a confidential relationship with Ms. Shaw-Baker.

102. At all material times, Byrd had a confidential relationship with Ms. Shaw-Baker.

103. At all material times, Kouten had a fiduciary relationship with Alice Shaw Baker after his appointment as court appointed counsel/visitor and guardian ad litem and continuing to the present.

104. Huckabee and Slade coerced Ms. Shaw-Baker by undue influence to execute her May 21, 2001 Will, substituting their wishes for hers.

105. Defendants made false representations that they would aid and assist Ms. Shaw Baker in the event she became incapacitated.

Defendants breached their fiduciary duty by failing and refusing to assist Ms. Shaw Baker when it became obvious that she was no longer able to care for herself.

106. Due to Huckabee and Slade's said coercion and undue influence, Ms. Shaw-Baker's May 21, 2001 Will was void ab initio.

107. Defendants, and each of them, actually accepted and induced the confidence placed in them by Alice Shaw Baker.

108. Defendant Kouten engaged in ex parte communications with the Probate Court on numerous occasions, prior to Ms. Shaw Baker's death. He continued to engage in this unauthorized conduct after her death, all to Ms. Shaw Baker's detriment. Defendant Kouten submitted an ex parte proposed order in June 2009 in the Will Contest action, where he did not copy opposing counsel. Plaintiff is informed and believes that he engaged in ex parte communication on other occasions related to the orders.

109. Further, Plaintiff is informed and believes that Defendant Kouten requested that the caregivers act contrary to the best interest of Ms. Shaw Baker. He requested that they search Ms. Shaw Baker's home and provide him with documents. After her death, Defendant Kouten asked one caregiver to get him a copy of the Will, and not inform Ms. Shaw Baker's conservator/guardian, Lisa Fisher.

110. Said Defendants took control of a portion of Alice Shaw Baker's assets without notice to plaintiff, the heirs,

the Attorney General on behalf of animal charities, the Court, or the Probate Court, including but not limited to, \$16,000.00 of Ms. Shaw Baker's cash proceeds from her IRA (Wells Fargo). Defendants disobeyed the Statutory requirements and Court orders to obtain a bond, all causing losses to Alice Shaw Baker's estate.

111. Defendant Peter Kouten owed a fiduciary duty to the decedent Alice Shaw Baker as her court ordered attorney. Such fiduciary duties included, but were not limited to, good faith and fair dealing, duty of loyalty, duty to avoid adverse interests, conflicts of interests, and dual representation.

112. His actions set forth herein were per se violations of the Rules of Professional Conduct. He continued to engage in these breaches after her death, all to the harm of her estate. He engaged in admitted ex-parte communications with the Court, he conspired with Defendants to hide assets belonging to Ms. Shaw Baker. He sought to gain advantages for his clients, now Defendants Huckabee, Slade, and Byrd, by inducing third parties to lie and obtain personal records of Ms. Shaw Baker, without notice to her conservator Lisa Fisher, all to the detriment of Alice Shaw Baker.

113. On information and belief, Plaintiff asserts that Defendant Kouten breached his fiduciary duty and acted on behalf of the other defendants prior to December 2008, while Ms. Shaw Baker was alive. He engaged in ex-parte communications with the Probate Court without notice to Ms. Shaw Baker's conservator and/or her counsel. These ex-parte statements prejudiced Ms. Shaw Baker, and continues to harm her estate. These breaches caused harm to her personal well being and her estate.

114. As a direct and proximate result of Defendants, and each of their various breaches of fiduciary duties, the decedent suffered substantial and overwhelming damages in an amount according to proof at trial.

115. Such acts constituting breach of fiduciary duty were intentional, wilful, fraudulent, oppressive and malicious and were undertaken in bad faith with the intent to injure and damage the decedent. Accordingly, Plaintiff is entitled to an award of exemplary and punitive damages from Defendants, and each of them.

THIRD CAUSE OF ACTION

[LEGAL MALPRACTICE]

As To Plaintiff Against Defendant Peter Kouten

116. Plaintiff reasserts the foregoing allegations as if set forth herein verbatim.

117. The defendant Peter Kouten, by reason of his attorney-client relationship with the decedent Alice Shaw Baker, had a duty to provide adequate and reasonable legal advice and services in matters concerning the conservatorship proceeding and her estate. Defendant Peter Kouten further owed a duty of loyalty and to avoid actual and/or potential conflicts of interests. (See. S.C. Rules 1.3, 1.6, 1.7, 1.8, 1.9, 1.14, 1.16, 3.3; 3.4, 3.5.)

118. His representation of Defendants Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd should have mandated immediate withdrawal as their attorney, in light of his representation of Alice Shaw Baker. Mandatory withdrawal was required to prevent him from adversely affecting his responsibility to her. Defendant Kouten failed to obtain, and could not obtain, consent from Ms. Shaw Baker in

violation of South Carolina Rules of Professional Conduct, Rule 1.7; See also Townsend v. Townsend, 323 S.C. 309 (1996) [Former wards of attorney guardians ad litem are protected from conflicts in subsequent litigation pursuant to 1.7 and 1.9 of Rule 407, SCACR].

119. During the course of the attorney client relationship with Alice Shaw Baker, the defendant Peter Kouten failed to exercise reasonable care and skill in advising and representing Alice Shaw Baker and performing legal services on her behalf, including but not limited to adversely representing and advising Defendants Bessie Huckabee and Kay Passailaigue Slade about attempting to secure interests in the real and personal property of Alice Shaw Baker, when he knew that Ms. Shaw Baker's intentions were that her monies and property were to benefit animal rescue agencies only.

120. Defendant Kouten engaged in ex parte communications with the Probate Court on numerous occasions, prior to Ms. Shaw Baker's death. He continued to engage in this unauthorized conduct after her death, all to Ms. Shaw Baker's detriment. Defendant Kouten submitted an ex parte proposed order in June 2009 in the Will Contest action, where he did not copy opposing counsel. Plaintiff is informed and believes that he engaged in ex parte communication on other occasions related to the orders.

121. Further, Plaintiff is informed and believes that Defendant Kouten requested that the caregivers act contrary to the best interest of Ms. Shaw Baker. He requested that they search Ms. Shaw Baker's home and provide him with documents. After her death, Defendant Kouten asked one caregiver to get him a copy of the Will, and not inform Ms. Shaw Baker's conservator/guardian, Lisa Fisher.

122. Said Defendants took control of a portion of Alice Shaw Baker's assets without notice to plaintiff, the heirs, the Attorney General on behalf of animal charities, the Court, or the Probate Court, including but not limited to, \$16,000.00 of Ms. Shaw Baker's cash proceeds from her IRA (Wells Fargo). Defendants disobeyed the Statutory requirements and Court orders to obtain a bond and inventory the assets, all causing losses to Alice Shaw Baker's estate.

123. Further, Defendant Peter Kouten intentionally sought to deceive the court appointed conservator, Lisa Fisher, from this representation and these adverse interests. He requested that Alice Shaw Baker's caregivers lie to the court appointed conservator, to search Alice Shaw Baker's personal belongings, and to provide the property to him, rather than to turn it over to the conservator.

124. As a direct and proximate result of the Defendant Peter Kouten's negligent conduct, the plaintiff, on behalf of the decedent Alice Shaw-Baker's estate, has suffered damages, and will continue to suffer damages, in an amount presently unknown,

but to be established at the time of trial, according to proof.

FOURTH CAUSE OF ACTION

[ATTORNEY FEES AND COSTS]

As To Plaintiff Against All Defendants

125. Plaintiff reasserts the foregoing allegations as if set forth herein verbatim.

126. Plaintiff brought this action on behalf of Ms. Shaw-Baker's estate and all plaintiff's costs of this action, including reasonable attorneys' fees, are properly paid therefrom, and should be approved.

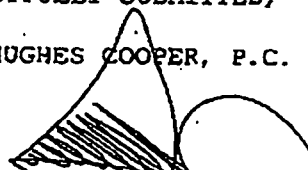
Prayer for Relief

WHEREFORE, Plaintiff prays that the Court inquire into this matter and award damages as follows:

1. For compensatory general and special damages according to proof;
2. For prejudgment interest in an amount to be determined at the time of trial;
3. An Order awarding costs of this action, including reasonable attorneys fees to Plaintiff, who brought this action for the benefit of Ms. Shaw-Baker's Estate;
4. Such other or further relief as justice may require.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE
Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Bl. Ste. 7
Mt. Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

ATTORNEY FOR PLAINTIFF,
BETTY FISHER, Real Representative for Alice
Shaw Baker

Mt. Pleasant, South Carolina

February 23, 2012

VERIFICATION

COMES NOW Betty Fisher who deposes and says:

1. My name is Betty Fisher.
2. I am a citizen of the United States, over 18 years of age, and of sound mind.
3. I have read the foregoing VERIFIED COMPLAINT and know the contents of thereof and the same are true to the best of my knowledge, except as to the matters therein stated to be on information and belief, and as to those matters I believe them to be true.
4. The sources of my information and the grounds of my belief are my personal knowledge and documents.
5. Further affiant sayeth naught.

Betty Fisher
Betty Fisher

Long Beach, California
February 23rd, 2012

[See Attached Notarization]

JURAT

State of California

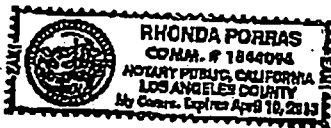
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on

this 23rd day of February, 2012

by Betty Fisher

~~personally known to me or~~ proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



(seal)

Signature

A handwritten signature in black ink, appearing to read "Rhonda Porras", written over a horizontal line.

Attached TO DOCUMENT "VERIFICATION" DATED FEBRUARY 23, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

Betty Fisher,
Plaintiff,
v.
Bessie Huckabee, etal.,
Respondents.

MOTION FOR
SUMMARY JUDGMENT
AND DISMISSAL OF ACTION

FILED
2012 JUL 16 PM 3:24
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW the Respondents in the above action, seeking Motion for Summary Judgment and Motion to Dismiss. The Respondents respectfully requests this Honorable Court grant these motions.

GROUND FOR DISMISSAL

- I. Plaintiff Betty Fisher has filed a Complaint in this court on April 27, 2009 and has refused to seek final hearing in this matter. The aforementioned Complaint filed under 2009-CP-10-3010 has as its base the same claims and therefore, this action should be dismissed under South Carolina Rules of Civil Procedure Rule 12(b)(8).
- II. Plaintiff Betty Fisher has failed to state a claim upon which relief can be granted and, as such, this motion shall be treated as one for summary judgment under South Carolina Rules of Civil Procedure Rule 56.
- III. Plaintiff Betty Fisher has yet to obtain a favorable determination that she has standing in any matter. This matter should be dismissed without prejudice until Plaintiff seeks a hearing on the determination on the validity of Alice Shaw-Baker's Last Will and Testament.

I.

Plaintiff's original complaint was filed more than three years ago and Plaintiff has not sought hearing on the core issue of the determination of the validity of the Last Will and Testament of the decedent. The Plaintiff sought Temporary Restraining Order of Personal Representative of the estate and the Court's restraining order indicated that the P.R. was restrained from all things. Upon motion for reconsideration, the Court allowed the P.R. to

continue administrative duties of the estate. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, appealed the Court's Order for Reconsideration and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, sought appeal en banc and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, have appealed the Motion for Reconsideration, which merely granted the P.R. authority of administrative duties, to the South Carolina Supreme Court. The appeal to the Supreme Court has nothing to do with the validity of decedent's Last Will, yet, Plaintiff has declined to seek hearing and determination of the Last Will's validity.

Co-Plaintiff of the prior action, Lisa Fisher, was the prior Conservator for the decedent prior to her death. Lisa Fisher was removed by the probate court as conservator and was ordered to turn over the estate assets to a financial intermediary. Lisa Fisher has filed appeal of the probate court order and has refused to turn over the estate assets. Evidence exists that Lisa Fisher has continued to expend estate assets without authority and after she had been removed as conservator.

Plaintiff has merely to have this Court determine whether the Last Will is valid or it is not. All other issues are directly related to the issue of the validity of the Last Will. Respondents ask that the Court dismiss this action and order the Plaintiff to seek final hearing in the prior Complaint.

II.

Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's prayer seeks relief which can only be granted upon determination of a prior Complaint. Respondent's ask this Honorable Court to Dismiss this action without prejudice until such time as a determination in the prior action may be had.

III.

Plaintiff and her representatives had access to decedent's home when she was deemed a vulnerable adult. Plaintiff and her representatives had access to the decedent's records, files and the entire contents of the house. Plaintiff and her representatives removed contents of the home including the decedent's Last Will. Upon the death of decedent, it was a representative for the Plaintiff who was in possession of the original Last Will and who turned over the original Last Will to the probate court so that Respondent Bessie Huckabee could be appointed. The probate court, upon appointment of the conservator, sought copy of the Last Will for the Guardianship/Conservatorship file and the Last Will copy was filed with the probate court therapeutic division by the conservator or her representative. The only ones with access to the decedent's records and files were the Court-Appointed Guardian, the Plaintiff and her representatives. This matter should be dismissed with prejudice until Plaintiff seeks a hearing on the determination on the validity of Alice Shaw-Baker's Last Will and Testament.

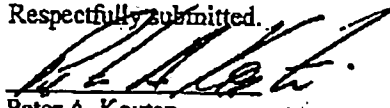
CONCLUSION

WHEREFORE, based upon the foregoing, Respondents respectfully requests this Honorable Court to:

1. Dismiss Plaintiff's Complaint without prejudice until the Court can hear and make a determination on the prior complaint.

2. Order that the Plaintiff seek final hearing on the matter of determining the validity of decedent's Last Will and Testament.
3. Allow Respondent's recovery of costs and fees associated with defense of this action, and
4. Any such further relief deemed by this Honorable Court.

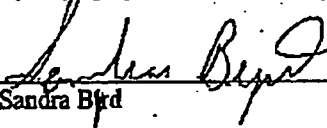
Respectfully submitted,

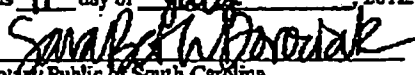

Peter A. Kouten
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 20457
(843) 670-3919
Attorney for Respondents

July 11, 2012
Charleston, South Carolina

VERIFICATION

I, Sandra Bird, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.


Sandra Bird

Sworn to and subscribed before me
this 11 day of July, 2012.

Notary Public of South Carolina
My commission expires: 10/4/22

VERIFICATION

I, Bessie Huckabee, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.

Bessie Huckabee
Bessie Huckabee

Sworn to and subscribed before me
this 11 day of July, 2012.
Shirley B. Dorian
Notary Public of South Carolina
My commission expires: 10/4/22

VERIFICATION

I, Kay Passallaigue, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.

Kay Passallaigue
Kay Passallaigue

Sworn to and subscribed before me
this 11 day of July, 2012.

Sarah Beth Drouin
Notary Public of South Carolina
My commission expires: 10/4/22

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

BETTY FISHER, as Real Representative)
FOR Alice Shaw-Baker,

Plaintiff,

v.
BESSIE HUCKABEE et al

Defendants,

MOTION BY PLAINTIFF BETTY
FISHER, AS REAL REPRESENTATIVE
FOR ALICE SHAW-BAKER, TO
DISQUALIFY AND REMOVE
OPPOSING COUNSEL PETER KOUTEN
DUE TO NON-WAIVABLE CONFLICT
OF INTEREST;
MEMORANDUM OF LAW;
AFFIDAVIT OF ATTORNEY LISA
FISHER

COMES NOW Plaintiff Betty Fisher, as Real Representative for Alice Shaw Baker, and moves this court to disqualify and remove Defendants Bessie Huckabee, Bay Passailague Slade, and Sandra Byrd's attorney of record, Peter Kouten ("Attorney Kouten").¹

The basis of this motion is Attorney Kouten's prior representation of the decedent in this will contest, Alice Shaw Baker ("Ms. Shaw Baker). Said representation is in violation of S.C. Rules of Professional Conduct, including but not limited to: Rule 407, Rules §§ 1.7, 1.9, et seq. and the legal authority set forth in Townsend v. Townsend, 323 S.C. 309, 474 S.E. 2d 424 (1996).

//

Attorney Peter Kouten is also a named Defendant in this matter.

FILED

2012 AUG - 1 PM 1:15
JULIE J. ARSANO
CLERK OF COURT

I.

INTRODUCTION

The principles guiding disqualification of an attorney are based on the accepted premise that an attorney may not use information or do anything which will injuriously affect his or her former client.² Attorney Peter Kouten violated these venerable principles, and the Rules of Professional Conduct when he began representing Defendants prior to and after his former client's death. This motion is brought to end his continued representation in violation of Ms. Shaw Baker's rights, and contrary to the S.C. Rules of Professional Conduct.

A. Statement of Facts

On February 25, 2009, Alice Shaw Baker ("Ms. Shaw Baker") died.

Plaintiff Betty Fisher and Attorney Lisa Fisher are the niece and great-niece of Ms. Shaw Baker. Plaintiff brought this Elder Abuse action, as real representative, to vindicate Alice Shaw-Bakers' rights.³

Plaintiff alleges that during Ms. Shaw Baker's life, Defendants Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd ("Defendants") deceived her, and exerted undue influence to obtain her property and monies. Ms. Shaw Baker intended to leave all her estate and monies to animal charities. Defendants knew her intentions, and thereafter

² "Disqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest ... is protected." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmt. 1 (2000).

³ Plaintiff Betty Fisher and Lisa Fisher have also filed a Will contest action (Circuit Court case no. 2009-CP-10-3010). (Hereinafter "Will contest")

colluded to deceive her and pretended ownership in an animal rescue to gain her trust and confidence. This elder abuse action, specifically, seeks to recover from Defendants, including Attorney Kouten, for their neglect, exploitation, collusion and psychological abuse of Ms. Shaw Baker to remain in her home, her ability to obtain hospital services, and her desire that all of her monies be used for charitable purposes. Ms. Shaw Baker intended to leave all her estate and monies to animal charities. Defendants knew her intentions, and thereafter colluded to deceive her and pretended ownership in an animal rescue to gain her trust and confidence.

In or about September, 2008, Defendants reported Ms. Shaw Baker to initiate Guardianship proceedings through the Charleston City Police. Thereafter, Elizabeth Spencer of City of Charleston Elder Supportline filed a guardianship/conservatorship petition with the Probate Court.

Immediately upon learning of her troubles, Plaintiff Betty Fisher and Lisa Fisher rushed to her side and sought to assist Ms. Shaw Baker. Despite Ms. Shaw Baker's efforts and desire to live independently, the Probate Court went forward with the petitions and the investigation required under S.C. Code Ann. § 62-5-303.

As part of that investigation, and pursuant to mandatory requirement in the Code, Judge Tamara Curry of the Probate Court appointed Attorney Peter Kouten as visitor, guardian ad litem, and attorney for Alice Shaw Baker. On October 20, 2008, he filed a visitor's report. (Attached hereto is a true and correct copy of said report marked as Exhibit A) He was appointed to represent Ms. Shaw Baker at the trial in opposition to the conservatorship. At the conclusion of the trial, the court ordered him to continue as Ms. Shaw Baker's visitor, visiting her every week until her death.

He submitted numerous bills and reports to the court as Attorney, Visitor, and Guardian ad litem. For example, On December 23, 2008, Attorney Kouten submitted his monthly visitor's report to the Probate Court. (Attached hereto is a true and correct copy of said report marked as Exhibit B) Accompanying that report was a bill for services rendered to Alice Shaw Baker, directed to Lisa Fisher, requesting payment in the amount of \$4,500.84. (Attached hereto is a true and correct copy of said bill marked as Exhibit C, including the prior order of November 12, 2008 in the amount of \$3,915.84)

He also e-mailed Lisa Fisher wherein he informed her that he (and his sons) were removing (and interfering) with Alice Shaw Baker's property without the conservator's consent. (See attached hereto is a true and correct copy of said e-mail marked as Exhibit D, emphasis added.)⁴

Attorney Kouten's action in analyzing Ms. Shaw Baker's property, without prior authorization from guardian/conservator Lisa Fisher creates additional problems necessitating his removal as counsel. He has information about Ms. Shaw Baker's estate property.

There can be no doubt that Attorney Kouten gained confidential information which impacts these proceedings. On December 18, 2008, Attorney Kouten e-mailed guardian/conservator Lisa Fisher and told her in part:

⁴ Attorney Kouten undermined Lisa Fisher's authority. Lisa Fisher had already specifically told Alice Shaw Baker's caregivers that they were not to interfere with or rummage through Ms. Shaw Baker's property. All of this was contrary to the best interest of Ms. Shaw Baker. These same caregivers acted in concert with Attorney Kouten's clients, Defendants herein, to try and gain control and custody of the real property and monies for Defendants' sake. These were the same caregivers, who Attorney Kouten, used to seek information about the whereabouts of the revoked will and to deceive Lisa Fisher.

"I have been checking on Alice and she has been in good spirits. I will continue to visit until the court relieves me. Please call me if you need me to do anything for Alice. I have yet to see any report from doctors. I will keep you posted."

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit E)

His actions were so imposing that they interfered with the powers of the Guardian/Conservator, Lisa Fisher, because he was acting as the investigating arm of the court. Lisa Fisher had no knowledge about any relationship of Attorney Kouten with Defendants, and that information provided to him would be transmitted to defendants in their scheme to gain control of the assets. Lisa Fisher maintained contact with him to ensure compliance with the probate court's order. In Attorney Kouten's e-mail to her, the communications concerning the doctor and the court's orders, included his statement: "Be assured that I will help check on Alice as long as you like. Peter" ⁵ (Attached hereto is a true and correct copy of said e-mail marked as Exhibit F)

In another e-mail, on January 2, 2009, Attorney Kouten disclosed, not only that he had "ex parte" communications with the court about Ms. Shaw Baker, but that he wanted to interfere with Lisa Fisher's function, as guardian :

⁵ Lisa Fisher (as outlined in her affidavit) was not, nor did she ever request, help from Attorney Kouten. She was required to maintain contact with him in compliance with the court order, and required to communicate with him about the desires and needs of Alice Shaw Baker, and ensure that he had correct information that he was providing to the court. Nor did she request Attorney Kouten "check" on Alice Shaw Baker.

"I spoke with the court on Wednesday and they suggested mailing her [Former temporary guardian Jane Orenstein] a confirmation of our discussion after we speak.

I will make sure she knows:

1. She is no longer appointed in any capacity as it applies to Alice.
2. any contact re: Alice should come through me or John or Lisa"

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit G,

emphasis added)⁶

On January 5, 2009, Attorney Kouten communicated directly with the former temporary co-guardian, Jane Orenstein, stating emphatically:

" The important outcome is that you are noticed that I am continuing in my duties as Court-Appointed Visitor."

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit H,

emphasis added)

Plaintiff sent Attorney Kouten gift certificates for work that his children did on Alice Shaw Baker's behalf, which he acknowledged. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit I). Neither plaintiff, nor Lisa Fisher as conservator, had requested him to do any work on the decedent's behalf.

At the time, Lisa Fisher did not realize the import of the communications between the Court and Attorney Kouten. However, She became alarmed, once she realized neither she nor her counsel, were present at the time of these communications in violation of rules governing ex parte communication.

This pattern of ex parte communication and lack of notice continued after Ms. Shaw Baker's death. Attorney Kouten has now admitted to submitting an ex parte proposed order in June 2009 in the Will Contest action, where he did not copy opposing counsel. He also did Not give notice to family with regard to the informal probate. He engaged in ex parte communication on other occasions.

With said e-mail, he attached his weekly report demonstrating that he was continuing to report to the court on Ms. Shaw Baker's care. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit J).

Said e-mail included an invoice requesting payment of fees in the amount of \$1,275.00. (Attached hereto is a true and correct copy of said invoice marked as Exhibit K).

At the same time, he included an order regarding his fees. (Attached hereto is a true and correct copy of said proposed order marked as Exhibit L).

On January 14, 2009, Attorney Kouten e-mailed Lisa Fisher regarding the care and doctor's reports for Ms. Shaw Baker:

"Please find attached visitor's letter to the Court concerning Dr. Waid's evaluation. It seems that the next step in satisfying the Court Order is to receive and forward the "medical evaluation by a medical doctor." Further, Dr. Waid sought an evaluation from a "Geriatric Psychologist." This appointment should be set and final evaluation and report should be forwarded to the Court. When these items are complete, it appears that the Court would like to set a status conference to determine the procedure to back off of 24 hour care if warranted."

(Attached hereto is a true and correct copy of said email dated January 14, 2009 marked as Exhibit M, emphasis added).

In said e-mail, he forwarded a letter that he directed to Elizabeth Sykes of the Probate Court re: the report from Dr. Waid. This report outlined the cognitive and neuropsychological condition of Ms. Shaw Baker. (Attached hereto is a true and correct copy of said letter marked as Exhibit N).

Within less than a month, Alice Shaw Baker was hospitalized in an attempt to regulate her medication, when the caretakers claimed she would not take her medicine. As outlined by Lisa Fisher in her affidavit, Peter Kouten admitted going to the hospital, admitted to communications and advocacy for Defendants, and within moments of Ms. Shaw Baker's heartwrenching death on February 25, 2009—he admitted having an appointment with Defendants Huckabee and Slade to open the probate.⁷ On March 2, 2009, he filed a Petition for Informal Probate seeking the appointment of Defendant Bessie Huckabee, and failed to give notice to Plaintiff Betty Fisher. (Attached hereto is a true and correct copy of Petition for Informal Probate marked as Exhibit O, emphasis added).

Thereafter, Plaintiff Betty Fisher and Lisa Fisher filed this Will Contest in April 27, 2009, Attorney Kouten filed on behalf of Defendants an answer. (Attached hereto is a true and correct copy of said answer marked as Exhibit P).

Plaintiff Betty Fisher has diligently sought to prosecute the Will contest case, have been forced to appeal prior decisions, and demanded that Attorney Kouten withdraw as

⁷ It was at this same time that Defendants sent the caretakers to wrongfully get the keys to Alice Shaw Baker's home and removed property and papers. As court appointed counsel/guardian ad litem, this action was in violation of U.S. Const. Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...")

Lisa Fisher contends this action was at the direction of Attorney Kouten. After/at her death, Attorney Kouten asked one caregiver to get him a copy of the Will, and not inform Ms. Shaw Baker's conservator/guardian, Lisa Fisher.

Further, Attorney Kouten, on behalf of his clients, obtained a significant portion of Ms. Shaw Baker's estate assets, in excess of \$16,000.00, without filing an inventory in the underlying probate or obtaining a bond pursuant to the statutory requirement (S.C. Code Ann. § 62-3-605) to do so and the court order requiring a bond.

counsel for Defendants.⁹ He refuses. Now, he has decided to represent them in this new action. He does so with the knowledge that he is violating the rules of Professional conduct. (See S.C. Rules Prof. Conduct, rule 1.16 (a lawyer shall not represent a client under certain circumstances and should those circumstances come to light after an attorney-client relationship has been established, a lawyer must withdraw from representation in an appropriate manner [emphasis added])).

In this case, Plaintiff has been subjected to the knowledge that Attorney Kouten took Ms. Shaw Baker's money to represent her pursuant to court order; gained the trust and confidence of not only Ms. Shaw Baker, but of plaintiff; interfered with her daily care, her medical treatment, and those around her—Attorney Kouten violated all of his fiduciary duties, all of his ethical duties, and all of his statutory duties. These violations mandate the grant of this motion for his disqualification as more fully set forth herein:

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Plaintiff moved before the Court of Appeals to remove Attorney Kouten. While the court denied the Motion, it stated:

"This decision, however, is limited to the proceeding in this court and is without prejudice to Appellants to raise their concerns and move for relief under appropriate circumstances in either the probate court or the circuit court." (Court of Appeals March 4, 2011 Order, p. 2, emphasis added).

II.

PURSUANT TO THE STATUTORY SCHEME FOR THE PROTECTION OF THE ELDERLY, VULNERABLE, AND DISABLED. ATTORNEY KOUTEN WAS APPOINTED TO REPRESENT ALICE SHAW BAKER.

THE RULES FOR ATTORNEY CONFLICT OF INTEREST APPLIED TO ALICE SHAW BAKER AND MANDATE ATTORNEY KOUTEN'S DISQUALIFICATION AS COUNSEL FOR DEFENDANTS.

A. Kouten's Prior Representation

In the guardianship/conservatorship proceedings, Attorney Kouten was appointed visitor, guardian ad litem, and attorney on behalf of Alice Shaw Baker. The laws governing these appointments are fully set forth in South Carolina Code Ann. § 62-5-101 et seq.

Alice Shaw Baker was determined to be an "Incapacitated person" for purposes of these hearings. The definition of an "incapacitated person" is "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property." (S.C. Code Ann. § 62-5-101(a)(1).)

Under subsection (5) of South Carolina Code Ann. § 62-5-101 (a), A "guardianship proceeding" is a "formal proceeding under the provisions of Part 3 of Article 5 (Section 62-5-301, et seq.) to determine if a person is an incapacitated person, or to appoint a guardian for an incapacitated person." Attorney Kouten was appointed to represent Ms. Shaw Baker at these proceedings.

The procedure for the determination of an incapacitated person is set forth in South Carolina Code Ann. § 62-5-303. This includes a statutory requirement that "... the court shall send a visitor to the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court." (Emphasis added)

Further, the court "...shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem. (see also Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995) (stating a guardian ad litem represents and protects the interests of a party during the litigation). A guardian ad litem is a representative of the court, appointed to assist it in properly protecting the interests of an incompetent person. (Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990), emphasis added.)

Attorney Kouten, as guardian ad litem, had a duty of advocating the best interests of his ward. Under laws governing a guardian ad litem, he should not have, in future proceedings, represented any parties with interests opposed to the best interests of his former ward. (Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996), emphasis added.)

As evidenced in Exhibits A through N, Attorney Kouten was appointed Alice Shaw Baker's attorney, visitor and guardian ad litem. He continued to report to the court until February 2009. Under any and all of these roles, disqualification of Attorney Kouten as counsel for the defendants is mandated. It is well settled that although a ward is usually not considered a "client" of a guardian ad litem, the ward will be considered a client for purposes of the rules relating to attorney conflicts of interest. (See Townsend v.

Townsend , 323 S.C. 309, 474 S.E. 2d 424 (1996), emphasis added). Here, there can be no doubt that rules relating to attorney conflicts of interest apply. He represented Alice Shaw Baker at her trial. All of the information, he obtained and provided to defendants was obtained as confidential communications.⁹

As set forth below, the laws governing attorney conflicts of interest require removal of Attorney Kouten as counsel for defendants.

III.

UNDER THE PRINCIPLES SET FORTH IN TOWNSEND V. TOWNSEND AND THE RULES OF PROF. CONDUCT, THE COURT HAS A DUTY TO DISQUALIFY ATTORNEY KOUTEN

Under S.C. Rules Prof. Conduct, Rule 1.9, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. (Emphasis added)¹⁰

⁹ Pursuant to S.C. Ethical opinions, Opinion 12-10, a lawyer must not release confidential information to an adverse executor of the estate without obtaining an order from the probate court or as specifically authorized by the deceased client.

¹⁰ See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000) ("[A] lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse.");

See also ABA MODEL RULES OF PROF. CONDUCT § 1.9(a) (1996). Further, pursuant to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §

The decedent, Alice Shaw Baker can not (and would not) give her informed consent allowing Attorney Kouten to represent defendants.¹¹

It is well settled that under the rules relating to attorney conflicts of interest, a lawyer owes a duty of loyalty to former clients. (In re Johnson, 386 S.C. 550, 689 S.E.2d 623 (2010), Rule 407, SCACR, Rule 1.9, emphasis added)¹²

Concurrent conflicts of interest can arise from a lawyer's responsibilities to a former client. See Rule 407, SCACR, Rule 1.7, Comment 1.

In evaluating a lawyer guardian ad litem's potential conflict of interest in subsequent relations, matters are "substantially related" when the guardian ad litem

122 (2000)

"Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."

¹¹ See United States Supreme Court decision regarding application of the attorney client privilege after death. (See *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998); see also *Glover v. Patten*, 165 U.S. 394, 406-408 (1897)).

¹² Moreover, South Carolina Ethical Opinion 94-14 (1994) explains the relationship in cases of "conflict of interest" in conservatorship and estate proceedings. In said case, the attorney represented the grandmother as personal representative of the estate of her son and as conservator of her grandson. A conflict of interest arose with regard to life insurance proceeds. The conflict of interest between the grandmother and grandson required the attorney to withdraw from representation of the grandmother and also would prohibit the attorney from assuming representation of the grandson without the grandmother's consent.

Other jurisdictions have also discussed the significance of former representation. See *In re Hostetter*, 238 P. 3d 13 (2010), where the Oregon Supreme Court found an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased.

reasonably could have gained information in the first matter that would be relevant to the second matter. (See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

Here, as Decedent's Guardian ad Litem, Kouten, conducted an investigation pursuant to S.C. Code Ann. § 62-5-303 and represented Decedent as her Guardian ad Litem pursuant to S.C. Code Ann. § 62-5-407(b). As evidenced by Exhibits A through N, Kouten regularly visited with Decedent from October 2008 through February 2009, and irrefutably obtained confidential communications and information that is relevant to this Will Contest.¹³

Attorney Kouten has a duty of advocating Ms. Shaw Baker's true interests regarding the disposition of her estate. The positions of Kouten's former ward, Ms. Shaw Baker, and those of his current clients, Defendants ("the Contested Beneficiaries"), have evolved to become adverse. Moreover, Attorney Kouten's clients, the Contested Beneficiaries, will not inherit if the contested will is found invalid or revoked. Additionally, Plaintiff has filed on behalf of Ms. Shaw Baker's estate an Action against Attorney Kouten and Defendants for their abuse and neglect of Ms. Shaw Baker as a vulnerable adult. (See *Betty Fisher, as Real Representative for Alice Shaw Baker v. Bessie Huckabee, et al.*, Circuit Court Case no. 2012-CP-10-1332).

¹³ One of the issues at trial is Ms. Shaw Baker's revocation of the alleged "Will" probated by Defendants. Attorney Kouten has confidential information which mandate his withdrawal (or in this case disqualification/removal). (S.C. Rules Prof. Conduct, rule 3.7 [A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...]; see also S.C. Bar Eth. Adv. Op. 91-26 [where an attorney was both guardian ad litem and advocate in a potential involuntary commitment proceeding, that attorney may not act as witness and advocate (citing Rule 3.7 of the Rules of Professional Conduct)]; and see Rule 1.6.390 [confidential communications])

It is not for Attorney Kouten to determine the veracity of the conflicting allegations regarding the validity of Decedent's May 21, 2001 will, nor the veracity of the conflicting allegations regarding the Contested Beneficiaries' neglect of Decedent as a vulnerable adult. Instead, he has a duty to withdraw. A lawyer shall not represent a client if representation is adverse to another client's interests unless both clients consent. (See In re Johnson, 386 S.C. 550, 689 S.E.2d 623 (2010); Rule 407, SCACR, Rule 1.7, emphasis added.) If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer obtains consent from both clients.

Attorney Kouten has purposefully and blatantly continued to represent clients (Defendants herein) who have an adverse interest to the true intentions of Alice Shaw Baker—his former client. He has done so with knowledge that Ms. Shaw Baker was devoted to animal rights, intended that all of her property and monies go to these animal charities, and that Defendants falsely claimed to Alice Shaw Baker that they owned an animal charity! He has done so with the knowledge that he obtained confidential information from Ms. Shaw Baker. (See Exhibits A through N) Finally, he is charged with knowing that Ms. Shaw Baker, due to her untimely and suspicious death,¹⁶ can not consent or waive the conflict.

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¹⁶ Despite specific orders by Guardian/Conservator Lisa Fisher that all medical efforts were to be made for Alice Shaw Baker's medical condition, Lisa Fisher discovered that "Do Not Resuscitate" ("DNR") orders had been given at the hospital.

IV.
PRAYER

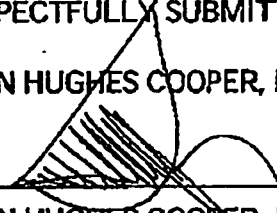
The Court has ample authority, and, in fact, a duty to remove Kouten from representation of the Defendants. Attorney Kouten has placed himself in a position of divided loyalties where he attempts to represent Defendants when they are adverse to his former client.

This is in direct conflict of interest and a ground for disqualification. The paramount concern to preserve public trust in the scrupulous administration of justice, the ethical considerations that affect the fundamental principles of the judicial process and the integrity of the bar mandate his withdrawal. (See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

WHEREFORE, Plaintiff respectfully moves to disqualify and remove Peter A. Kouten from representation of any party in this matter due to his conflict of interest.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

July 30, 2012

2/14/08

AFFIDAVIT OF LISA FISHER

PERSONALLY APPEARED before me LISA FISHER, who being first duly sworn, stated as follows:

1. My name is Lisa Fisher, and I am over the eighteen and of sound mind.
2. I have personal knowledge of the matters set forth herein and if called and sworn to testify, I could and would competently do so. I am an attorney in good standing in the State of California.
3. Alice Shaw Baker was my great aunt. I was the guardian and conservator of Alice Shaw Baker during her life.
4. I have reviewed the Motion and Statement of Facts in this Motion for Disqualification/ Removal of Peter A. Kouten due to his Conflict of Interest.
5. As set forth in the motion, Peter Kouten was appointed to represent the decedent, Alice Shaw Baker at trial. On October 20, 2008, he filed a visitor's report. (Attached hereto is a true and correct copy of said report marked as Exhibit A) He was appointed to represent Ms. Shaw Baker at the trial in opposition to the conservatorship. At the conclusion of the trial, the court ordered him to continue as Ms. Shaw Baker's visitor, visiting her every week until her death.
6. He submitted numerous bills and reports to the court as Attorney, Visitor,

and Guardian ad litem. For example, On December 23, 2008, Attorney Kouten submitted his monthly visitor's report to the Probate Court. (Attached hereto is a true and correct copy of said report marked as Exhibit B)

7. Accompanying that report was a bill for services rendered to Alice Shaw Baker, directed to me, requesting payment in the amount of \$4,500.84. (Attached hereto is a true and correct copy of said bill marked as Exhibit C, including the prior order of November 12, 2008 in the amount of \$3,915.84).

8. He also emailed me on or about December 23, 2008 wherein he informed me that he (and his sons) were removing (and interfering) with Alice Shaw Baker's property without my consent. (See attached hereto is a true and correct copy of said e-mail marked as Exhibit D, emphasis added.)

9. On December 18, 2008, Attorney Kouten e-mailed me. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit E)

10. I had no knowledge about any relationship of Attorney Kouten with Defendants, and that information provided to him would be transmitted to defendants in their scheme to gain control of the assets.

11. I maintained contact with Attorney Kouten to ensure compliance with the probate court's order. I did not request help from Attorney Kouten. I did not ask Attorney Kouten "check" on Alice Shaw Baker. (Attached hereto is a true and correct copy of an e-mail from Peter Kouten dated January 16, 2009 marked as Exhibit F)

12. Attached hereto is a true and correct copy of an e-mail from Attorney Kouten dated on January 2, 2009 marked as Exhibit G. Attorney Kouten admitted to ex parte communications both in the probate court and in the circuit court, prior to and after Alice Shaw Baker's death.

13. On January 5, 2009, Attorney Kouten communicated directly with the former temporary co-guardian, Jane Orenstein. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit H)

14. Attached hereto is a true and correct copy of an email from Attorney Kouten acknowledging gift certificates for work that his children did on Alice Shaw Baker's behalf. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit I).

15. With said e-mail, he attached his weekly report demonstrating that he was continuing to report to the court on Ms. Shaw Baker's care. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit J).

16. Said e-mail included an invoice requesting payment of fees in the amount of \$1,275.00. (Attached hereto is a true and correct copy of said invoice marked as Exhibit K).

17. At the same time, he included an order regarding his fees. (Attached hereto is a true and correct copy of said proposed order marked as Exhibit L).

18. On January 14, 2009, Attorney Kouten e-mailed me regarding the care and doctor's reports for Ms. Shaw Baker. (Attached hereto is a true and correct copy of said

email dated January 14, 2009 marked as Exhibit M, emphasis added).

19. In said e-mail, he forwarded a letter that he directed to Elizabeth Sykes of the Probate Court re: the report from Dr. Waid. This report outlined the cognitive and neuropsychological condition of Ms. Shaw Baker. (Attached hereto is a true and correct copy of said letter marked as Exhibit N).

20. Within less than a month, Alice Shaw Baker was hospitalized in an attempt to regulate her medication, when the caretakers claimed she would not take her medicine. Despite my specific orders that all medical efforts were to be made for Alice Shaw Baker's medical condition, I discovered that "Do Not Resuscitate" ("DNR") orders had been given at the hospital. Peter Kouten admitted going to the hospital, admitted to communications and advocacy for Defendants, and within moments of Ms. Shaw Baker's heartwrenching death on February 25, 2009—he admitted having an appointment with Defendants Huckabee and Slade to open the probate.

21. On March 2, 2009, he filed a Petition for Informal Probate seeking the appointment of Defendant Bessie Huckabee, and failed to give notice to Plaintiff Betty Fisher. (Attached hereto is a true and correct copy of Petition for Informal Probate marked as Exhibit O, emphasis added).

22. Thereafter, Plaintiff Betty Fisher and Lisa Fisher filed a Will Contest on April 27, 2009, Attorney Kouten filed on behalf of Defendants an answer. (Attached hereto is a true and correct copy of said answer marked as Exhibit P)

23. My great aunt was greatly loved and respected by her family, and her untimely death was devastating. I respectfully request that the court grant this motion to disqualify and/or remove Attorney Kouten.

24. FURTHER, AFFIANT SAYENT NAUGHT.

By: _____

Lisa Fisher

Subscribed and sworn to before me

This _____ day of July, 2012

(SEAL)

Notary Public

My Commission Expires: _____

JURAT

State of California

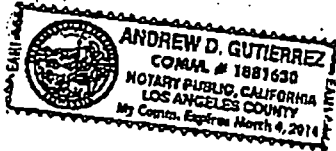
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on

this 21st day of July, 2012

by Lisa Fisher

personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.



(seal)

Signature

A handwritten signature in dark ink, appearing to be "Andrew D. Gutierrez", written over a horizontal line.

Re: Affidavit of Lisa Fisher

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

BETTY FISHER, as Real Representative)
for Alice Shaw-Baker,)

Plaintiff,)

v.)
BESSIE HUCKABEE et al)

Defendants,)

IN THE COURT OF COMMON PLEAS)
FOR THE NINTH JUDICIAL CIRCUIT)
CASE NO. 2012-CP-10-1332)

RETURN, OBJECTION, AND)
OPPOSITION BY PLAINTIFF BETTY)
FISHER, AS REAL REPRESENTATIVE)
FOR ALICE SHAW-BAKER, TO)
MOTION FOR SUMMARY JUDGMENT,)
AND DISMISSAL OF ACTION;)
MEMORANDUM OF LAW;)

AFFIDAVITS IN SUPPORT FILED)
CONCURRENTLY)

FILED
2012 NOV 26 AM 11:55
JUDGE J. ARMSTRONG
CLERK OF COURT

COMES NOW Plaintiff Betty Fisher, as Real Representative for Alice Shaw Baker, and objects to this Court's consideration of Defendants Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd's attorney of record, Peter Kouten ("Attorney Kouten") Motion for Summary Judgment and Dismissal of Action:¹

I.

INTRODUCTION

Alice Shaw-Baker died on February 25, 2009. This action is not the same action as in the pending Will Contest, entitled *In the Matter of Alice Shaw Baker Estate, Betty Fisher et al. v. Bessie Huckabee et al.*, case no. 2009-CP-10-3010. The parties are not the same, and most importantly the relief sought is different.²

On February 24, 2012, Plaintiff Betty Fisher ("Plaintiff") filed this action, as Real Representative for Alice Shaw Baker. Any relief obtained by this action would be to recover for the damage incurred personally for Ms. Shaw Baker—thus, it is a survival action for her benefit.

¹ Attorney Peter Kouten is also a named Defendant in this matter.

² The Will Contest has not yet gone to trial.

It is well settled that the test of a survival action in South Carolina is whether the *decedent* suffered conscious pain and suffering. (See *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 139, 28 S.E.2d 683, 685 (1944) (emphasis added).) As set forth in the affidavit of Lisa Fisher, Alice Shaw Baker suffered pain and suffering due to the actions of Defendants.³ There are triable issues of fact as to all of the causes of actions in plaintiff's complaint.

Moreover, Plaintiff contends that as a matter of law, Defendants' Motion is fatally defective. As set forth below, there is no doubt that a defendant may seek relief under these statutory provision, however they also have the burden of demonstrating "the absences of a genuine issue of material fact." (See *Richardson v. The State Record Co., Inc.* 330 S. C. 562, 499 S.E. 2d 822, 824-825)

In this case, Defendants have not, and can not, even established that the grounds for dismissal as stated in their motion even support dismissal in this case.

Finally, Plaintiff respectfully requests that the court continue the motion as required under Rule 56 (f) to allow plaintiff time to obtain further information relevant to these causes of action. Although plaintiff believes that this opposition adequately demonstrates triable issues of facts in this case, granting summary judgment at this juncture when no discovery has been had, would cause grave prejudice to plaintiff and would be in violation of Due Process.

³ While the moving papers identify "Respondents", the complaint was against Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten as Defendants. The moving papers failed to identify which parties are seeking relief.

While plaintiff can assume that it is Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd, in light of the fact that they signed verifications. There is no representation as to why Peter Kouten has not filed a responsive pleading and/or joined this motion. Plaintiff objects to this motion as to Peter Kouten, and objects to the factual allegations as verified by Defendants Huckabee, Slade, and Byrd. Plaintiff contends that the verifications do not meet the statutory requirements under S.C. Rules of Civil Procedure, Rule 56(e) [personal knowledge requirement], and that they can not verify what is merely argument by counsel, nor does it meet the requirements under Rule 7(b)(1), in that it fails to state with "particularity the grounds" for relief. Moreover, the allegations do not accurately reflect the facts and events leading to this case.

In light of the fact that Defendants have not answered, plaintiff has not had an opportunity to conduct meaningful discovery in this action, and the moving papers lack any real notice of the relief sought, plaintiff contends such action would be a violation of her Due Process rights under the U.S. Const. IV and XIV, and the S.C. State Const., Art. I, § 3.

II. STATEMENT OF THE CASE

On February 24, 2012, Plaintiff as Real Representative for Alice Shaw Baker filed this action . The Complaint has four causes of action: 1) Violation of Omnibus Adult Protection Act; 2) Breach of Fiduciary Duty against all defendants; 3) Legal Malpractice as to Defendant Kouten; 4) Attorney Fees and Costs.

While the Complaint includes all appropriate facts,⁴ the grounds for the action can be summarized as Defendants' Huckabee, Slade, and Byrd told Alice Shaw Baker that they would help her when she was older, make sure she could stay at home, and make sure that her health, personal, and financial decisions were properly addressed. They refused to help her in her time of need, allowed her to deteriorate, refused to call family, left her to live in substandard conditions, and interfered with her medical treatment all leading to her early demise. Their actions constituted abandonment, neglect and led to unnecessary and unhealthy isolation. Moreover, when she discovered this betrayal, Alice Shaw Baker wept bitterly, suffering serious pain and confusion over the prior representations of these "friends".

The Complaint also alleges that Peter Kouten was acting in concert with the other Defendants while Alice Shaw Baker was alive. Despite knowing that Alice Shaw Baker's estate, assets, and real property were meant for animal charities, he failed to inform the probate court, he interfered at the hospital with the care and well being of Ms. Shaw Baker, and he acted in violation of the Rules of Professional Conduct by dual representation of the other defendants in this action. Even while Ms. Shaw Baker was in the hospital, he was advising Defendants on how to obtain her real property, personal property, and the means to ensure her early death, by trying to enforce Bessie Huckabee's

⁴ Plaintiff is merely summarizing the case, in no way is she waiving or ignoring the underlying facts. As outlined in the affidavits, this case is about the harm that Alice Shaw Baker suffered.

power of attorney (which had been revoked by the court), and interfering with the conservator/guardian's power for medical authorizations.

It was a sad and difficult time for Ms. Shaw Baker, and *she* suffered the consequences and knew the effect of Defendants' failure to help her and the effect of having her court appointed attorney, Peter Kouten, intentionally interfere with her desires and health.

As outlined below, Neither Defendants' motion for Dismissal or Summary Judgment can be granted in this action.

III. STANDARD OF REVIEW

A. RULE 12(b)(8)

A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim. (See *Capital City Insurance Co. v. BP Staff, Inc.*, 382 S.C. 92 (2009) [when cases are fundamentally and structurally different, court must deny motion.]) A trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. (See *McEachern v. Black*, 329 S.C. 642, 496 S.E.2d 659, 661 (1998).)

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. 1 C.J.S. Abatement and Revival § 54 (2005).

"[O]ur supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." (See *Crickepot Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 31, 701 S.E. 2d 39, 44 (Ct. App. 2010).)

Here, plaintiff seeks relief on behalf of Alice Shaw Baker for *her* damages, including but not limited to pain and suffering, while the Will Contest looks at the decedent's actual intent to dispose of her property.

The Will Contest relief is completely different from the causes of action for 1) Violation of Omnibus Adult Protection Act ("Omnibus Act"); 2) Breach of Fiduciary Duty against all defendants; 3) Legal Malpractice as to Defendant Kouten; 4) Attorney Fees and Costs. These are neither "precisely the same" nor "substantially the same" as any claim in the first proceeding. Moreover, Plaintiff Betty Fisher is not suing in the same capacity in both actions.

For these reasons, the motion must be denied under Rule 12.

B. RULE 56

Defendants seek alternate relief under Rule 56-Summary Judgment. However, It is well settled that the Court gives every benefit of the doubt to the non-moving party in summary judgment motions. (See *Watters v. Terminix Service*, 376 S.C. 632, 635; 658 S.E. 2d 110, 111 (2008).)

The party seeking summary judgment has the initial responsibility of demonstrating the absences of a genuine issue of material fact. Plaintiff contends that the moving documents of defendants are fatally defective, because they have failed to address all of the issues of fact in the case, and have ignored the pleading in its entirety.

With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by "showing"--that is, pointing out to the [trial] court--that there is an absence of evidence to support the nonmoving party's case. The moving party need not support its motions with affidavits or similar materials negating the opponent's claim. " (*Richardson v. The State Record Co., Inc.* 330 S. C. 562, 499 S.E. 2d 822, 824-825 (1998).) In this case, Defendants have made no effort to, and can not, demonstrate that there is no evidence as to plaintiff's causes of action.

While "...a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment," (See *Thoma v. Waters*, 315 S.C. 324, 445 S.E.2d 659, 661 (1994)), the Court in *Montgomery v. CSX Transportation, Inc.*, 376 S.C. 37, 53, 656 S.E. 2d 20, 29 (2008) explained that "even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." (Emphasis added).

In ruling on a motion for summary judgment, the evidence and inferences can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. (See *Johnson v. Paraplane Corp.* 319 S.C. 247, 251, 460 S.E.2d 398, 400 (1995).)

Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment. (See *Trivelas v. S.C. Dept. of Transportation*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (2001).)

Summary judgement is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. (See *Smith v. S.C. Dept. Highways*, 296 S.C. 11, 13, 370 S.E.2d 101, 102 (1998).) Further, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery. (See *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 112, 410 S.E. 2d 537, 543 (1991).)

Finally, Summary Judgment should not be granted if further inquiry into the facts is desirable to clarify the application of the law." (See *ML-Lee Acquisition Fund, LP v. Deloitte & Touche*, 320 S.C. 143, 463 S.E. 2d 618, 624 (1995).)

Plaintiff has filed an action which seeks the very type of relief available under the "Omnibus Act" to secure justice and relief for the vulnerable adult's harm. The affidavits of Lisa Fisher, Candace Rickborn, and David Kessler conclusively establish that there are triable issues of fact that warrant denial of this action on the "Omnibus Act" cause of action. Alternatively, these affidavits support plaintiff's assertion that she has not yet had a full and fair opportunity to complete Discovery.

With regard to the Legal Malpractice and Breach of Fiduciary Duty causes of action, Plaintiff has presented the Expert Declaration of Mark Hardee, Esquire which conclusively establishes that there are triable issues of fact with regard to these causes of actions.⁵

⁵ On a defendant's motion for summary judgment, a genuine issue of material fact is established by a plaintiff presenting expert testimony on the standard of care and the breach by defendant. (See *Jernigan v. King*, 312 S.C. 331 (1993).)

IV.

PUBLIC POLICY CONSIDERATIONS FAVORING RELIEF FOR ELDER ABUSE CLAIMS ON BEHALF OF VULNERABLE ADULTS LIKE ALICE SHAW BAKER.

Public Policies related to the protection of the Elderly originally emerged from the government's concern for adults who could not manage their own affairs. In 1987, the federal government first described elder abuse, neglect, and exploitation under the Amendments to the Older Americans Act. Abuse is categorized as domestic abuse and institutional abuse. Within these broad categories, physical, sexual, emotional/psychological abuse may occur, along with neglect, self-neglect, abandonment, and financial exploitation (NCPEA, 2002).⁶

South Carolina has been considered a leader in its efforts to protect the elderly. In so doing, they have enacted an important and powerful statutory scheme to address abuse of the elderly in whatever forum it may be found. By bringing this action, Plaintiff is seeking to redress Alice Shaw Baker's harm.

V.

PLAINTIFF'S STANDING AS "REAL REPRESENTATIVE" IS ESSENTIAL TO PROTECT THE RIGHTS OF ALICE SHAW BAKER, IN A MATTER WHERE THE ALLEGED PERPETRATORS WILL NEVER TAKE ACTION AGAINST THEMSELVES AND THEIR COHORTS.

Although Defendants fail to explain the "standing" issue in their motion, the law is long established in the case of *Duke v. Postal Telegraph Cable Co.*, 71 S.C. 95, 50 S.E. 675 (SC 1905), that "heirs at law are the real representatives." (Emphasis added)

⁶ Pamela B. Teaster, *A RESPONSE TO THE ABUSE OF VULNERABLE ADULTS: The 2000 Survey of State Adult Protective Services* (2002) (Emphasis added).

Therefore, under S.C. Code Ann. Section 15-5-90, claims survive both to and against the personal or real representative, as the case may be.

Defendant Bessie Huckabee will not take any action against the other defendants (or herself) to seek relief for Alice Shaw Baker. In light of the fact that *she* initially broke Ms. Shaw-Baker's heart,⁷ as outlined in the affidavits, by refusing to help her. The refusal to help her when she was the stated power of attorney (See Exhibits Q and R). She allowed Alice Shaw Baker to live in squalor, to not receive adequate medical and nursing care, to deteriorate both physically and mentally, to be isolated and denied access to her church and her belief in God, and ultimately to be subjected to a guardianship/conservatorship—all to Alice Shaw Baker's harm.

The only person who would have the courage to bring this action is plaintiff Betty Fisher, whose love and devotion mandates seeking justice for Alice Shaw Baker against the terrible abuse as protected under the "Omnibus Act".

As outlined by Lisa Fisher, all defendants took actions that harmed Ms. Shaw Baker during her life—separate and apart from their scheme and collusion to obtain her life works (which is the subject of the Will Contest action).

Plaintiff had to file this action, separately, to ensure that it was timely filed and to ensure that Ms. Shaw Baker recovered for the harm done to her.

⁷ The Supreme Court explained in *Spaugh v. Atlantic Coast Line Railroad, Co.* 158 S.C. 25, 155 S.E. 145 (1930) that:

"In order to receive bodily injury, it was not necessary that the plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body. Having her nervous system injured and being made sick, in the manner she testified, constitutes bodily injury . . . provided the proof establishe[d] negligence on the part of the defendant's agent . . . and such negligence caused the alleged injury complained of." (Emphasis added)

**VI.
THE CONDUCT COMPLAINED OF IN THE COMPLAINT
ESTABLISHES TRIABLE ISSUES OF FACT AS TO THE VICTIMIZATION OF ALICE
SHAWBAKER, A VULNERABLE ADULT**

The affidavits of Lisa Fisher, Candace Rickborn, David M. Kessler, and even Mark Hardee, Esquire show that Defendants failed to assist Alice Shaw Baker, provide her with appropriate physical and mental care, failed to contact family, did not make any effort to help her stabilize her diabetes or obtain proper medical care. All of these things led to the harm, grief, suffering, and later hospitalization. She was isolated, and when she was going to be institutionalized, she was abandoned by Defendants.

The court in *Williams v. Watkins*, 665 S.E.2d 243, 379 S.C. 530 (S.C.App. 07/23/2008) set forth the purpose of the "Omnibus act":

"In 1993, South Carolina's General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. 1993 Act No. 110, § 1, codified as S.C. Code Ann. §§ 43-35-5 to - 595 (Supp. 2007)."

It went on to explain that "The Act promulgated statutes designed to protect a class of adults from abuse, neglect, and exploitation. The Act defines a "vulnerable adult" as:

"[A] person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult. S.C. Code Ann. § 43-35-10 (Supp. 2007)."

The court went on to analyze a Minnesota Court of Appeals decision which specifically addressed and construed a statute similar to the Vulnerable Adults Act. The court set forth:

"In re Kleven, 736 N.W.2d 707 (Minn. Ct. App. 2007). In Kleven, an employee of a group home for disabled men argued the verbal abuse she allegedly had inflicted upon the men should be viewed from the perspective of the residents, all vulnerable adults, rather than from the perspective of a reasonable person. Id. at 710. However, the court held in Kleven that to accept such an argument "would mean that the more vulnerable the adult, the worse his caretaker could permissibly treat him. . . . [This] interpretation is an affront to the purpose of the act and leads to absurd results, which we presume the legislature did not intend." Id. at 711.

As here, Defendants take no responsibility for the position that they left Alice Shaw Baker in. They take no responsibility for the harm and suffering she was exposed to prior to the intervention of the State. They take no responsibility for the harm and suffering they exposed her to after the conservatorship/guardianship. This abandonment, neglect, exploitation, and prior isolation caused her grave harm. This is the type of relief warranted under the act.

In a federal decision, *Williams Garrett v. Murphy*, 106 F.Supp.2d 834 (2000), the court held that the legislature intended to create a Private cause of action under South Carolina Omnibus Adult Protection Act for the act of abusing, neglecting, or exploiting vulnerable adults. S.C.Code 1976, §§ 43-35-5(4, 5), 43-35-80.

Moreover, the legislature in S.C. Code § 43-35-85 provides for criminal punishment of a person who "knowingly and wilfully abuses or neglects a vulnerable adult resulting in death". This further demonstrates the extent of protection the legislature wanted for vulnerable adults, that it would and does extend after their death.

Alice Shaw Baker meets the definition of a vulnerable adult, the conduct described meets the definition of abuse, exploitation and constitutes isolation and neglect. The affidavits raise triable issues of fact as to Defendants' conduct for abusing, neglecting, and exploiting Alice Shaw Baker.

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VII.
**TRIABLE ISSUE OF FACT EXISTS AS TO DEFENDANT KOUTEN'S WRONGDOING
AND LEGAL MALPRACTICE**

A plaintiff must prove: 1) Defendant owed a duty of care to the plaintiff; 2) defendant breached that duty of care by a negligent act or omission; 3) Defendant's breach was an actual and proximate cause of the plaintiff's injury; and 4) the plaintiff suffered an injury or damages. (*Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007).

Generally, a plaintiff in a legal malpractice case must establish the standard of care by expert testimony, unless the subject matter is of common knowledge to laypersons. (See *Smith v. Haynsworth, Marion, McKay & Geyrard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002); *Henkel v. Winn*, 346 S.C. 14, v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2001).)

The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. (See *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 548 (1990); *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966).) Proximate cause does not mean the sole cause. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998).

The defendant's conduct can be a proximate cause if it was a least one of the direct, concurring causes of the injury. (See *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 398, 237 S.E. 2d 753, 757 (1977).

As evidenced in the exhibits attached hereto relating to the appointment of Defendant Kouten as court appointed attorney, guardian ad litem, and visitor, plaintiff has established that he had an attorney client relationship with Alice Shaw Baker. These affidavits further

demonstrate that his conduct was below the standard of care, and that they caused Ms. Shaw Baker damage and harm.

Defendant Kouten was appointed by the Court to represent Alice Shaw Baker, in the scope of providing those services, he was privy to her estate plan, and her private concerns, and as such he had a duty to exercise reasonable and ordinary care and diligence.

He was required to contact and deal with Alice Shaw Baker's great niece, and appointed conservator and guardian, therefore as outlined in the declaration of Candace Rickborn, a caregiver for Alice, his actions in attempting to deceive Ms. Fisher after Alice's death breached a duty of care to her and her estate.

Here, prior to Alice Shaw Baker's death, Peter Kouten knew that Defendants did not own an animal charity. He also knew that her estate monies were directed to animal charities, and that Defendants were taking advantage of her vulnerable estate. He breached his duty to properly inform the court, breached his duty to Alice to make sure that others were not trying to take her assets contrary to her wishes, and actively participated in the deception to ensure that Alice's estate went to his "other" clients, Defendants Huckabee, Slade, and Byrd. Moreover, he intentionally interfered with Lisa Fisher's authority at the hospital, which led to improper DNR orders, and led to the untimely death of Alice.

In light of these facts, triable issues of fact exist as to the legal malpractice and breach of fiduciary duty of Defendant Kouten.

The court in *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) found that "[a] fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." This applies to all defendants.

As to Defendant Kouten alone, the courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship. (*Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991); *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987); *Royal Crown Bottling Co. v. Chandler*, 226 S.C. 94, 83 S.E.2d 745 (1954); *Wise v. Hardin*, 5 S.C. 325 (1874); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000).)

"The relationship of an attorney with his or her client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith." *Weatherford*, 340 S.C. at 582, 532 S.E.2d at 315 (quoting 7 Am. Jur. 2d Attorneys at Law § 137 (1997)).

Finally, the court in *Hotz* reversed a summary judgment where an attorney misled a daughter concerning the effect of her father's will.

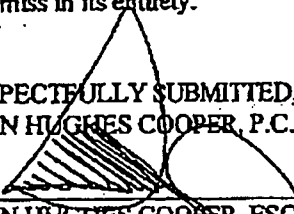
Here, the court "...shall appoint an attorney to represent him in the proceedings and that attorney shall have the powers and duties of a guardian ad litem. (see also *Stefan v. Stefan*, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995) (stating a guardian ad litem represents and protects the interests of a party during the litigation). A guardian ad litem is a representative of the court, appointed to assist it in properly protecting the interests of an incompetent person. (*Shainwald v. Shainwald*, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990), emphasis added.)

Attorney Kouten, as guardian ad litem, had a duty of advocating the best interests of his ward. Under laws governing a guardian ad litem, he should not have, in future proceedings, represented any parties with interests opposed to the best interests of his former ward. (*Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), emphasis added.)

His failure constitutes legal malpractice and breach of fiduciary duty, all raising triable issues of fact precluding the grant of this motion.

WHEREFORE, Plaintiff respectfully requests that the court to deny Defendants' Motion of Summary Judgment, and Motion to dismiss in its entirety.

RESPECTFULLY SUBMITTED,
JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and
LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

November 26, 2012

2012-1332

AFFIDAVIT OF DAVID KESSLER

PERSONALLY APPEARED before me DAVID KESSLER who being first
duly sworn, stated as follows:

FILED

NOV 26 2012

1. I am over the age of eighteen and of sound mind and body. **JULIE D. ARMSTRONG**
CLERK, C.P. & G.S.

2. I have personal knowledge of the matters set forth herein and if called and sworn to testify, I could and would competently do so.

3. EXPERTISE AND BACKGROUND: I am a retired Law Enforcement officer and current Investigator for a Prosecuting Attorney's office in the state of Ohio. I have investigated hundreds of cases of alleged financial exploitation of the elderly. In 1995 I assisted the South Carolina Attorney General's office and S.C. law enforcement with an investigation that targeted a criminal group known as "the Irish Travelers". This group are transient criminals who prey on elderly homeowners throughout the United States committing home improvement scams, confidence scams, and intimidation crimes against older adults.

4. I have been investigating and training on the topic of exploitation of the elderly since 1985 when I was a member of the DeKalb County, Georgia Police Department. I am the former Commander of the Financial Crimes Unit for DeKalb County Police

and the former Chief Investigator of the Elder Protection Section of the Ohio Attorney General's office.

5. Beginning in 2008, I began consulting on the topic of financial exploitation of the elderly which I believe is an area of under reported criminal activity. My website is www.ProtectingTheElderly.com. (Attached hereto is a true and correct copy of my Resume/CV marked as Exhibit A).

6. Understanding the elderly victim and their victimization requires extensive training and work experience in investigating these crimes. The elderly are victimized through undue influence and deception on the part of the perpetrator(s) of these crimes. Too often the victim is financially and emotionally violated by family, friends, or professionals who are held in a position of trust by the victim. A common theme of these crimes are that the older victim due to mental or physical health issues are frequently oblivious to their victimization and abuse.

7. Frequently through my investigations the very sad outcome is parallel to the term known as "the fox guarding the hen house." A entrusted person is placed in a position to protect the elderly persons financial assets and that person ends up

stealing those same assets they were sworn to protect. While these crimes are often characterized as "property crimes, the victims often experience emotional trauma and loss of self esteem through this victimization.

8. The elderly victim was raised in an era where a handshake was a bond as strong as any legal document. The perpetrators of these crimes know this fact and use this ideology to advance their crimes. By using undue influence and deception through the process of "grooming" the victim to gain the older victims confidence in the perpetrator. Finding common interests of the elderly victim such as pets, church, or children allows the perpetrator to also gain the confidence of the victim.

9. Isolating the elderly victim from their family and friends while at the same time convincing the victim that the perpetrator has the victims best interests at heart is critical in exploitation crimes. The perpetrator has to keep the victims family and friends away from the victim for fear of "red flags" appearing and raising suspicions. The use of deception is common, and an integral part of the scheme to have the victim seek assistance from the perpetrator.

10. These crimes are very well planned and manipulation of the victim is a must to be successful in stealing the elderly persons personal wealth. Law enforcement often misdiagnose financial exploitation of the elderly as a civil matter or a family issue due to the lack of training and knowledge needed to properly identify the crime. Understanding the dynamics involved with financial exploitation of the elderly is a specialty within the law enforcement profession and necessary to fully understand the role of a perpetrator in Civil actions as well.

11. DOCUMENTS REVIEWED: The documentary evidence I have reviewed supports the allegations of the Complaint and acts set forth above. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as:

- a. Verified Complaint of Plaintiff Betty Fisher, as Real Representative for Alice Shaw Baker;
- b. Visitor's Report of Defendant Kouten dated October 9, 2008 in Probate Court, Case no. 2008-GC-10-088;
- c. Post Hearing Court Ordered Visits beginning November 7, 2008 to December 1, 2008, including draft order, in the Matter of Alice Shaw-Baker, Case no. 2008-GC-10-088;

- d. December 3, 2008 billing from The Kouten Law Firm, LLC, to Lisa Fisher in the *Matter of Alice Shaw-Baker*, Case no. 2008-GC-10-088;
- e. Order granting Fees to Appointed Attorney Guardian ad litem filed the *Matter of Alice Shaw-Baker*, Case no. 2008-GC-10-088 dated November 12, 2008;
- f. Email to John Hughes Cooper dated December 23, 2008 from Defendant Kouten;
- g. Email to Lisa Fisher dated December 18, 2008 from Defendant Kouten;
- h. Email to Lisa Fisher and John Hughes Cooper dated January 16, 2009 from Defendant Kouten;
- i. Email from Lisa Fisher to Defendant Kouten dated January 14, 2009;
- j. Email from Peter Kouten to Lisa Fisher and John Hughes Cooper dated January 2, 2009;
- k. Email to Peter Kouten from Lisa Fisher dated January 2, 2009;
- l. Letter from Peter Kouten to Jane Orenstein dated January 5, 2009;
- m. Email from Peter Kouten to Lisa Fisher dated January 10, 2009;
- n. Post hearing Court ordered visits dated from December 12, 2008 from December 29, 2008 from Peter Kouten;

- o. Billing from The Kouten Law Firm to Lisa Fisher dated January 5, 2009;.
- p. Draft Order Granting Fees by Court Appointed Guardian ad Litem for Alice Shaw-Baker dated December 12-December 29, 2008;
- q. Email from Peter Kouten to Lisa Fisher and John Hughes Cooper dated January 14, 2009;
- r. Letter from Peter Kouten to Elizabeth Sykes of the Charleston County Probate Court dated January 14, 2009 re: Dr. Waid's report;
- s. Petition for Informal Probate of Will and appointment dated March 10, 2009, Probate Court, Case no. 2009-ES-10-378;-
- t. Fiduciary Letters, Personal Representative naming Bessie Huckabee, for Case no. 2009-ES10-00378, dated March 11, 2009;
- u. Answer of Defendants Bessie Huckabee; Kay Passailaigue Slade; Sandra Byrd in Will Contest matter, Case no. 2009-CP-10-3010
- v. Affidavit of Candace Rickborn;
- w. Deposition testimony of Kay Passailaigue Slade in case no. 2009-CP-10-3010;
- x. Deposition testimony of Bessie Huckabee in case no. 2009-CP-10-3010;

- y. Deposition testimony of Sandra Byrd in case no. 2009-CP-10-3010;
- z. Review of various documents from ING, National Life Insurance Company, and South Carolina Retirement Systems obtained in Case no. 2009-CP-10-3010;
- aa. Affidavit of Lisa Fisher.

12. APPLICATION TO ALICE SHAW BAKER: Due to Ms. Shaw Baker's vulnerability, based on her age and her mental state, I render this opinion to assist the court in understanding the types of criminal schemes that often also show up in the civil context.

13. As set forth in the Verified Complaint, the affidavits, and the documents that I have reviewed, Alice Shaw-Baker was the type of individual that I would describe as "high risk" for abuse by perpetrators of elder abuse schemes. As described, she was the type of person who had a passion for animals and would be susceptible to individuals who show any affinity to animals. This is described as a "niche" that perpetrators will often use to gain access and knowledge about their finances. These individuals are relentless in their attempt to destroy potential family relations, make the person dependent on them, and isolate them from real assistance. This often causes the victim to

suffer increased confusion and desperation so that they rely and believe the perpetrator.

14. As the facts are set forth in the documents I reviewed, Alice Shaw Baker was fearful of not having a person aide her as she got older. As set forth in the deposition testimony taken in the Will contest matter, Defendant Kay Passailaigue Slade knew about Alice's affinity for dogs and used that affinity to gain further information about Alice. For instance, she testified:

- a. "I want to say after I got a dog, we got closer because she had a dog."
- b. "I promised her -- when she retired from Charleston Memorial, the different departments took up a collection, and we did that so she could buy a Chihuahua. And we were talking one day, and she told me she was afraid to get one because what would happen to it if something happened to her. And I promised her that it would live with me until the day it died, and it would live with me and that's why she went out and got a dog."

//

- c. The only favors Alice asked Defendant Slade to take "her dogs to the emergency vet..." on three occasions after Alice no longer liked to drive over the bridge.
- d. Defendant Slade and Byrd were involved in dog obedience classes with Alice.
- e. Defendants got the coffins for her dogs and buried the dogs in her back yard.

15. The Victim, Ms. Shaw-Baker also believed that Defendants were involved in animal charities.

16. Defendant Slade even acknowledged that Alice was "beginning to treat me like her employee again."

17. When Alice needed help, help that it appears that they had promised to provide to her, they did not help her. Even when Ms. Fisher asked them to help they refused.

18. They provided none of the love and concern expected of friends who wanted to make her life better. Instead they spoke negatively about Ms. Fisher who came to assist Ms. Shaw-Baker.

19. As set forth in the Affidavit of Candace Rickborn, they showed no concern or sympathy for Alice. They did not visit her regularly, despite knowing that she was upset about the legal proceedings. Alice believed that Defendant Slade owned a dog rescue, and they exploited this false belief. While hospitalized, Defendant Huckabee would make calls and state that she had authority over Alice. Even in Alice's state, she asked Defendant Huckabee to leave because she was upset. They would repeatedly tell Alice to "go" and be with her dogs.

20. The affidavit of Ms. Rickborn, also shows that there were no signs of sympathy or grief for Alice while she was suffering in the hospital, and no signs of sympathy or grief when Alice died. Instead, their goal within moments of Alice's death was to get the keys and get the house under their control. While Alice was ill in the hospital, they spoke of personal issues and Defendant Slade even said that "Alice wanted me to have the house." While in the cafeteria on the day of Alice's death, they spoke of the "control" they had, and agreed to the statement: "F... Lisa". Using the same attorney, Defendant Kouten, to promote their scheme, when he should have been investigating their conduct was a means of preventing disclosure of their wrong doing.

21. As is typical in cases of isolation and abuse, they saw Lisa Fisher as a threat to their plans, because she had the opportunity and was already discovering that they had deceived Alice.

22. In criminal investigations, this is a classic example of a victim being targeted, using her love for animals to gain her confidence, so that they could continue to groom her and exploit her, and isolate from family and loved ones. Moreover, the use of deception concerning ownership of businesses (as here, where they falsely claim that Defendant Slade owned a dog rescue) is also indicative of a plan to exploit a victim who is vulnerable to abuse. The use of Defendant Byrd as a notary to nurture their plans and prevent any independent person from assisting is also commonplace.

23. In this case, it is in my professional opinion that Alice Shaw-Baker was subjected to a scheme to gain access to her assets and real property. The tactics of Defendants here against Alice Shaw-Baker are typical, and often support criminal prosecutions. By exploiting Alice Shaw-Baker's love for her animals, by promising to care for animals, by deceiving Alice Shaw-Baker into believing that Defendant Slade owned an animal rescue, and ultimately in interfering with the care and well

being of Alice Shaw Baker while she was hospitalized, led to the
abuse and victimization of Ms. Shaw-Baker.

FURTHER, AFFIANT SAYENT NAUGHT.

By: David M. Kessler
DAVID KESSLER

Subscribed and sworn to before me

This 19th day of November, 2012.

(SEAL)

Linda E. Ozy
Notary Public of Ohio
My Commission Expires: 9/22/16



Mr. Kessler is currently employed with the Fairfield County, Ohio Prosecuting Attorney's Office as an Investigator. He investigates a wide range of criminal offenses including theft/fraud crimes committed against Fairfield County Jobs and Family Services.

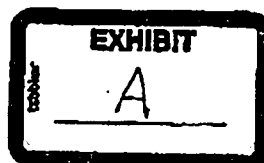
Mr. Kessler in 2008 began his training/consulting business **Protecting The Elderly** after twenty-eight years of government service as a Law Enforcement Officer, Chief Investigator, and National Trainer on the topic of Financial Exploitation of the Elderly.

David was recruited to the Ohio Attorney General's office in 1999 to lead that office's efforts against senior citizen crimes as Chief Investigator of the Consumer Protection Section.

Prior to his service in Ohio Mr. Kessler retired from the Dekalb County Police Department in Decatur, Georgia as the former commander of the Financial Crimes Unit.

David has recognized crimes against the elderly as a national problem that is often misunderstood and under investigated.

Mr. Kessler holds an Associates of Arts and a Bachelor of Science degree in Criminal Justice and is an active member of the Association of Certified Fraud Examiners (A.C.F.E.).



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12-CP-10-1332

AFFIDAVIT OF CANDACE RICKBORN

PERSONALLY APPEARED before me CANDACE RICKBORN who being first duly sworn, stated as follows:

1. I am over the age of eighteen and of sound mind.
2. I have personal knowledge of the matters set forth herein and if called and sworn to testify, I could and would competently do so.
3. I am a resident of Charleston County, a citizen of South Carolina. I was a caretaker for Alice Shaw Baker from approximately November 2008 until she died on February 25, 2009.
4. I worked full time with Ms. Shaw Baker. Her great niece, Lisa Fisher, hired me with specific instructions to encourage her to continue to remain independent, to try and get out of the house, and to provide her with positive companionship. Ms. Fisher had been appointed guardian and conservator for Alice.
5. Alice loved animals, so sometimes we would go to the veterinarian for my dog, and we would talk about dogs. They were her life, and she grieved over her dogs that had died over the

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last few years. Ms. Fisher consistently asked me to make sure that Alice was getting up and about.

6. During the entire time I was present, neither Bessie Huckabee nor Kay Slade came to visit Alice or called her at her home. Alice mentioned them on occasion, as her former employees. She further told me repeatedly that Kay Slade ran a dog rescue, even up and until her death. When Alice mentioned Kay, the fact that she ran a dog rescue was the most important thing to Alice.

7. In February, 2009, Alice was hospitalized from about February 15, 2009 until her death. Ms. Fisher asked me to sit with Alice during the hospitalization, because she was worried about her. Ms. Fisher told me that she was arranging for transportation to take Alice to California. I was at the hospital every day, and saw Peter Kouten the court appointed attorney for Alice.

8. While hospitalized, Alice was transferred to ICU. Kay Slade appeared at ICU. Bessie Huckabee never showed up to visit Alice until she was moved back to a private room. They would come only for a few minutes. Everything I did was to make sure that Alice was comfortable.

9. The hospital had moved Alice out of ICU. About February 23, 2009, Bessie Huckabee came to the hospital and tried to take over. She wanted to feed Alice and bully her into doing the things that she wanted to do. Alice became angry and told her to leave. Alice was very upset by Bessie's actions. At other times, Bessie Huckabee would use her cell phone in front of me calling someone and making sure that she now had authority over "Alice." It was disturbing to watch, and I felt that she was trying to impress upon me that she was in charge of Alice. Bessie and Kay would talk to each other during these visits, and Kay said on one of these occasions that "Alice wanted me to have the house." The statement was very inappropriate, and it made it seem like the only reason she was at the hospital was to get the house.

10. On February 25, 2009, Lisa Fisher called me early in the morning and asked me to come to the hospital. Lisa Fisher had planned to take her on an air ambulance to California. She had to go to the all night Pharmacy to get the medications for the trip. She was very concerned about Alice.

11. Throughout the last few hours of Alice's life, Ms. Fisher was trying to get Alice to California. At one point, she informed me that she was trying to get Alice home. She would

stay with Alice, but would have to leave the room to make arrangements. When Ms. Fisher left the room, Bessie and Kay would tell Alice she could "go" and be with her "dogs". They gave the appearance that they just wanted Alice's life over. Again, Bessie Huckabee would make calls about her "control" over Alice, and at one point, she said that she called Peter Kouten's office and made sure she could take over. Bessie's calls further interfered with the calm atmosphere in Alice's room. She was really loud during the calls and even when she stepped out in the hall she could still be heard in the room and I'm sure by other patients as well, because she was asked by hospital staff to first leave the room for the calls, then she was asked by staff to not even use her phone in the hall because she was so loud.

12. Because Ms. Fisher was so upset, I did not tell her about Bessie and Kay's statements that Alice could "go and be with her dogs," but it was the most disturbing and uncomfortable circumstance that I was ever in. I didn't know what to do, it was so upsetting. Finally, when Alice died, I was in the hall with two other former caregivers who had just appeared at the hospital. Ms. Fisher was in the hospital room with Alice and the doctors, obviously upset.

13. The other caregivers, Denise Ferguson and Kathryn Magwood told me to go to the cafeteria with them. I didn't know what else to do, so I walked down with them. Bessie was in the cafeteria. They told Bessie that Alice had died. There was no emotion or sadness in her face. At that time, they all started talking again about Bessie being in charge. At that point, Denise said "Fuck Lisa" and they all were in agreement. I couldn't believe it. I was very upset by Alice's death, and all of their actions seemed so wrong. Bessie Ruckabee asked me if I had the keys to Alice's house. I told her that I did. She asked me for them, and I said that I had some items in the house so I would have to get to her later. Since she had called Peter Kouten's office and others during the day, I thought I had to give her the keys. While I was still in the hospital parking lot, I received a call on my cell phone from Denise Ferguson, who informed me that Bessie told her to follow me to the house to get the keys. I got to the house and took my items out of the house, and gave them the keys. Later on, I finally received a call from Ms. Fisher, still upset about Alice's death, asking me if I was at the house. I told her what I had done, and she asked me to meet her at the house. She took care of the house at that point.

14. Ms. Fisher asked me to stay at the house a few days later. I received a call from Peter Kouten. He started the call

off "gossiping" about Alice, Bessie and Kay. He told me that they didn't have a copy of Alice's "Will" and asked me to look around for it, instructing me "not to tell Lisa Fisher" that I was looking for it. I received calls from Denise Ferguson saying that she had previously searched Alice's home office. She also asked me to look for documents

15. After Betty Fisher, Alice's niece, and Lisa Fisher filed this action, I went to court and noticed Renee and Mona with folders in court that day. It appeared that they had documents in them from Alice's home in them.

16. During Ms. Alice Shaw Baker's hospitalization Bessie Huckabee on more than one occasion lied to me about visiting Alice in the hospital. The dates and times she claimed to have visited with Ms. Alice were during my shift with her there, so I checked with nurses and staff to make sure she didn't stop at the nurse's station or slip in and out while I was momentarily in the bathroom or cafeteria. I also always checked with the caregivers from Maxim if they had any visitor's at night. It was my job to keep Ms. Fisher updated on all the happenings during her stay, visitors included. Bessie Huckabee gave me the impression that she was trying to make me believe her to be concerned for Ms.

Alice when she told me about these "visits" but she was unconvincing in her attempts.

17. During the time Denise Ferguson worked for Ms. Alice Shaw Baker, I often relieved her from her shift prior to mine. Ms. Alice was often noticeably agitated and upset when I arrived. While we exchanged shifts, Denise Ferguson would often comment to me on inappropriate conversations between she and Ms. Alice Shaw Baker. The conversations were usually about Ms. Shaw Baker's person business, her family, her estate and will. Because of Ms. Shaw Baker's emotional state when I would arrive, I would speak to Ms. Alice. It was clear that Ms. Alice did not initiate these conversations, and that the topics were initiated and manipulated by Denise Ferguson.

18. There was another incident where Denise Ferguson and Renee changed the schedule for an "alleged" shift that I was suppose to work. I had been relieved the night prior at 11 pm by Renee but was "supposedly" scheduled to return to work to relieve her at 7 am the next morning. Denise was of course "conveniently" able to work the shift and relieve her sister on time that Sunday morning. So not only did I "miss" the shift her "psychic powers" indicated to her that I would forget to work a shift I wasn't scheduled for. That is obviously a contradiction.

She then fabricated a complete lie to Ms. Fisher about my reason for missing work, when in reality she never spoke with me, or tried to contact me in anyway that day before I arrived for my TRUE shift at 3pm-11pm, scheduled precisely the same as the day before. She then explained to me her lie in person and then lied to me about the reason she gave Ms. Fisher for "allegedly" missing the 7 a.m. shift. Ms Fisher and I then conversed over the phone and at some point made sense of all the confusion. Denise had told Ms. Fisher that I had been in an car accident. The whole incident was a lie. I would never lie about something so potentially serious.

19. Denise Ferguson and her sister also often bullied and harassed me at work, calling me "the favorite" and disregarding messages I delivered from Ms. Fisher about Alice's care. Which jeopardized Ms. Baker's health and well being. They frequently did not want to work the shifts they were scheduled for and I filled in for them at their requests. Because I worked often with their shifts included with mine, I was put in more contact with Ms. Fisher because she called to check on Alice during our daily shifts.

20. The first actual day of Alice's hospitalization (she was admitted the night before) I reported to work my shift

with Alice and within the first hour of us visiting together she omnisciently stressed to me that she was tired of the situation the other caregiver's shady behavior created and was glad it was all over. My reflection now on their constant lies and unethical actions now separated from the stress of the moment surfaces how much they contributed to Alice's confusion and anger about her circumstances. Ferguson and her sister couldn't keep their lies straight to themselves, which was not conducive for Alice's care and well being. Ms. Fisher wanted Alice to be free from stress, encouraged us to allow Alice to take care of things she could, go out shopping, get exercise. Ms. Alice was her primary concern.

FURTHER, AFFIANT SAYENT NAUGHT.

By: Candace Rickborn

CANDACE RICKBORN

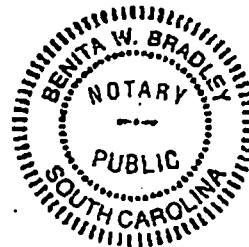
Subscribed and sworn to before me
This 1st day of November 2012.

(SEAL)

Benta W. Bradley

Notary Public of South Carolina

My Commission Expires: 10/30/2017



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CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

AFFIDAVIT OF MARK W. HARDEE

PERSONALLY APPEARED before me Mark W. Hardee, who being first duly sworn,
stated as follows:

1. I am over the age of eighteen and of sound mind.
2. I have personal knowledge of the matters set forth herein and if called and sworn to testify, I could and would competently do so.
3. This affidavit satisfied the requirements under S.C. Code § 15-36-100 which outlines "...at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."
4. I have familiarized myself with the facts which are set forth in the complaint.
5. As set forth herein, it is my expert opinion, held to a reasonable degree of professional certainty, that the facts alleged in this matter set forth demonstrate that Attorney Peter Kouten's conduct fell below the standard of care applicable to South Carolina lawyers. Under South Carolina law, "standard of care" means the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession in this State. (See *Holy Loch Distribs.*, 340 S.C. 20, 26, 531 S.E. 2d 282, 285 (2000).) As more fully set forth below, Attorney Kouten engaged in negligent, reckless or intentional acts and omissions under state law in his dealings with Alice Shaw Baker.

6. EXPERTISE AND BACKGROUND: As a preliminary matter, I have the following experience:

I graduated from the University Of South Carolina School Of Law in 1986. I then went to work for the Richland County Public Defenders Office as an Assistant Public Defender for

approximately two years. In the latter part of 1988, I went to work with the law firm of Lewis, Babcock, Pleicones & Hawkins located in Columbia, SC. While working with this firm, I was actively engaged in representing clients in complex litigation matters, including litigation involving property disputes, legal malpractice matters, and representing attorneys and members of the judiciary in ethics matters. I eventually became a partner with the firm and after approximately 13 years I left and started my own firm, The Hardee Law Firm. (Curriculum Vitae is attached)

7. I have continued handling various complex litigation matters including, property disputes, legal ethics and legal malpractice actions. I am familiar with lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, and as special disciplinary council. I have served as litigation consultant or as a testifying expert in legal malpractice cases, and have spoken at continuing legal education seminars on the issue of lawyer's ethics.

8. **DOCUMENTS REVIEWED:** The documentary evidence I have reviewed supports the allegations of the Complaint. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as:

- a. Verified Complaint of Plaintiff Betty Fisher, as Real Representative for Alice Shaw Baker;
- b. Visitor's Report of Defendant Kouten dated October 9, 2008 in Probate Court, Case no. 2008-GC-10-088;
- c. Post Hearing Court Ordered Visits beginning November 7, 2008 to December 1, 2008; including draft order, in the *Matter of Alice Shaw-Baker, Case no. 2008-GC-10-088;*

- d. December 3, 2008 billing from The Kouten Law Firm, LLC, to Lisa Fisher in the *Matter of Alice Shaw-Baker, Case no. 2008-GC-10-088*;
- e. Order granting Fees to Appointed Attorney Guardian ad litem filed the *Matter of Alice Shaw-Baker, Case no. 2008-GC-10-088* dated November 12, 2008;
- f. Email to John Hughes Cooper dated December 23, 2008 from Defendant Kouten;
- g. Email to Lisa Fisher dated December 18, 2008 from Defendant Kouten;
- h. Email to Lisa Fisher and John Hughes Cooper dated January 16, 2009 from Defendant Kouten;
- i. Email from Lisa Fisher to Defendant Kouten dated January 14, 2009;
- j. Email from Peter Kouten to Lisa Fisher and John Hughes Cooper dated January 2, 2009;
- k. Email to Peter Kouten from Lisa Fisher dated January 2, 2009;
- l. Letter from Peter Kouten to Jane Orenstein dated January 5, 2009;
- m. Email from Peter Kouten to Lisa Fisher dated January 10, 2009;
- n. Post hearing Court ordered visits dated from December 12, 2008 from December 29, 2008 from Peter Kouten;
- o. Billing from The Kouten Law Firm to Lisa Fisher dated January 5, 2009;
- p. Draft Order Granting Fees by Court Appointed Guardian ad Litem for Alice Shaw-Baker dated December 12-December 29, 2008;
- q. Email from Peter Kouten to Lisa Fisher and John Hughes Cooper dated January 14, 2009;
- r. Letter from Peter Kouten to Elizabeth Sykes of the Charleston County Probate Court dated January 14, 2009 re: Dr. Waid's report;

- s. Petition for Informal Probate of Will and appointment dated March 10, 2009,
Probate Court, Case no. 2009-ES-10-378;
- t. Fiduciary Letters, Personal Representative naming Bessie Huckabee, for Case no.
2009-ES10-00378, dated March 11, 2009;
- u. Answer of Defendants Bessie Huckabee; Kay Passailaigue Slade; Sandra Byrd in
Will Contest matter, Case no. 2009-CP-10-3010;
- v. Order from Appellate Court
- w. Affidavit of Candace Rickborn;

9. **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT:** I have been asked to opine on the standard of care in a case involving a court appointed attorney for Alice Shaw Baker. From the facts set forth in the documents reviewed, and my knowledge of the Rules of Professional conduct, I can state to a reasonable degree of certainty that Attorney Peter Kouten's representation of Ms. Shaw Baker was **below the standard of care.**
10. Defendant Kouten was appointed Guardian ad litem and Visitor for the decedent Alice Shaw-Baker. Law governing an guardian ad litem conclude that when a court appoints an attorney to represent a ward in a proceeding, he is duty bound to protect the interests of the his ward. (see also *Stefan v. Stefan*, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995). Further, A guardian ad litem is a representative of the court, **appointed to assist it in properly protecting the interests of an incompetent person.** (*Shainwald v. Shainwald*, 302 S.C. 453, 395 S.E.2d 441 (Ct. App. 1990), emphasis added.) Under the principles of *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), principles governing conflict of interest apply to guardian ad litem. Moreover, the court in

Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994) (applying South Carolina law), held that a cause of action for malpractice negligence may be asserted against a guardian ad litem. There, the court, relying on *Simpson v. Doggett*, 159 S.C. 294, 156 S.E.771 (1930), stated that South Carolina common law makes it clear that a guardian ad litem is liable to his ward for the negligent performance of his duties. Moreover, S.C. Code Ann. § 20-7-127 provides that a lay guardian ad litem may be held answerable to his ward for gross negligence. The same rationale applies to an attorney acting as a guardian ad litem. This relationship created professional, ethical and fiduciary duties that Defendant Kouten was bound to perform.

11. The relationship was a continuing relationship as demonstrated by other documents filed with the court, and collateral documents wherein he admitted that he was acting on behalf of Alice Shaw Baker. For instance, On October 20, 2008, he filed a visitor's report. He visited Ms. Shaw-Baker weekly. He filed reports with the court. He also admitted in documents that he spoke to the Probate Court without the presence of the conservator/guardian's attorney being present. (See January 2, 2009 email)
12. Defendant Kouten violated his duties to Alice Shaw Baker in numerous ways, including:
 - a. by failing to provide Ms. Shaw Baker with competent advice and representation and ordinary care, Ms. Shaw Baker's interests were not protected, including that:
 - b. by failing to investigate the prior actions of Bessie Huckabee, Kay Passallaigue Slade, and Sandra Byrd ("other defendants") to determine whether or not they in fact had an established animal charity as they had represented to Ms. Shaw Baker;
 - c. by failing to inform the Court that Ms. Shaw Baker had revoked her prior Will upon discovery that the "other defendants" did not have an established animal charity;

- d. by having ex-parte communications with the Probate Court without the presence of the conservator/guardian's attorney presence;
- e. by using information obtained from the investigation of the conservatorship/guardianship proceeding to advance the other defendants' positions, contrary to Ms. Shaw Baker's known position concerning animal charities;¹
- f. by communicating and taking this adverse position against Ms. Shaw-Baker and her desired Estate plan, Defendant Kouten took a position that was detrimental to Ms. Shaw Baker;
- g. Defendant Kouten's actions undermined the trust and confidence necessary to Ms. Shaw-Baker and led to adverse proceedings which have caused harm to her, her property and estate;
- h. by representing the other beneficiaries when he knew or through the use of legal knowledge, skill, thoroughness, and preparation should have known that his representation of these other beneficiaries was burdened by a nonconsentable concurrent conflict of interest (See Rule 407, SCACR, Rule 1.7, Comment 1; Rule 1.9);²

¹ S.C. Rules Prof. Conduct, rule 3.7 [A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...]; see also S.C. Bar Eth. Adv. Op. 91-26 [where an attorney was both guardian ad litem and advocate in a potential involuntary commitment proceeding, that attorney may not act as witness and advocate (citing Rule 3.7 of the Rules of Professional Conduct)]; and see Rule 1.6.390 [confidential communications].

² South Carolina Ethical Opinion 94-14 (1994) explains the relationship in cases of "conflict of interest" in conservatorship and estate proceedings. In said case, the attorney represented the grandmother as personal representative of the estate of her son and as conservator of her grandson. A

- i. Due to Ms. Shaw Baker's stated illness, Defendant Kouten knew that she could not make informed decisions concerning any representation of the other beneficiaries;
- j. Also, Defendant Kouten knew that his actions were inexplicably interfering with the role of the conservator/guardian by speaking to the Hospital concerning the care and treatment of Ms. Shaw Baker;
- k. Further evidence that he knew that his actions were harmful to Ms. Shaw Baker and her estate are demonstrated in his post death action, wherein he asked one of the caregivers to deceive the conservator/guardian of his surreptitious attempts to obtain documents of Alice Shaw-Baker and had ex-parte communications with the court involved in the will contest action;
- l. While engaged in the practice of law on behalf of the other defendants, in obvious conflict with his prior ward, he wrongfully participated in and handled transactions for these other defendants with knowledge that Ms. Shaw-Baker intended for her real property to benefit animal charities.
- m. The admissions made to Ms. Fisher by Attorney Kouten that he had spoken to these Beneficiaries prior to the death of Ms. Shaw Baker and within 30 minutes of her death already had set up the probate administration appointment support the conclusion that he had began representing them prior to the death of Ms. ~~Smith~~. *Shaw Baker*.

conflict of interest arose with regard to life insurance proceeds. The conflict of interest between the grandmother and grandson required the attorney to withdraw from representation of the grandmother and also would prohibit the attorney from assuming representation of the grandson without the grandmother's consent.

- n. The disclosure of Alice Shaw Baker's personal and private information to the Court, the caregivers, neighbors, and these purported beneficiaries without the presence of Ms. Fisher's counsel and/or consent of Ms. Fisher (conservator/guardian) interfered with Ms. Fisher's powers and her ability to ensure that Ms. Shaw Baker was receiving proper care. It also constituted ex parte communication in violation of the rules of professional conduct.
- o. Also, he has taken adverse positions against Alice Shaw Baker, by representing the purported beneficiaries. Alice Shaw Baker's estate was to benefit animal charities. He knew or should have known that Ms. Shaw Baker had revoked the Will naming the purported beneficiaries upon learning that Beneficiary Slade did not own/run an animal charity. He knew or should have known that even under the (now revoked) Will, that Ms. Shaw Baker had always intended that her Estate was intended for Animal Charities.
- p. He knew that the purported beneficiaries had also breached their duty to Alice Shaw Baker and promise to assist her in her old age.
- q. He knew that Ms. Fisher, as guardian/conservator, came regularly to Charleston, SC to aid her great aunt and had sole authority to make decisions about her care and treatment. Therefore, his actions in interfering with her duties was improper.
- r. Attorney Kouten knew that he had a duty to provide Ms. Shaw Baker with advice and to inform the court that the purported Will was contrary to Ms. Shaw Baker's wishes and the result of undue influence. He owed a duty of loyalty and to avoid actual and/or potential conflicts of interests and failed in performing for the benefit. (See. S.C. Rules 1.3, 1.6, 1.7, 1.8, 1.9, 1.14, 1.16, 3.3; 3.4, 3.5.)
- s. Because of the known conflicts, he was mandated to decline services to the other defendants;

t. Defendant Kouten failed to obtain, and could not obtain, consent from Ms. Shaw Baker to represent the adverse interests of the other defendants (See South Carolina Rules of Professional Conduct, Rule 1.7; See also Townsend v. Townsend, 323 S.C. 309 (1996)[Former wards of attorney guardians ad litem are protected from conflicts in subsequent litigation pursuant to 1.7 and 1.9 of Rule 407, SCACR]);

u. Thereafter, he continued to represent the other defendants after Ms. Shaw Baker's death, by directed the purported Executor to take control of the real and personal property of Ms. Shaw Baker, within 30 minutes of her death;

v. Moreover, even after receiving an order on June 8, 2009 to get a bond from the court in the Will contest matter, Attorney Kouten knew that his clients were in possession of in excess of \$16,000.00 that he had not inventoried. All of this was to Ms. Shaw Baker and her estate's harm.⁴

13. All of these failings also constituted breaches of the fiduciary duties owed by Defendant Kouten to the decedent Alice Shaw Baker, which proximately caused injury and damage to Ms. Shaw Baker during her lifetime and continued with the resulting need for plaintiffs to file a Will Contest and now to seek this relief to vindicate Ms. Shaw Baker's rights and desires.

14. In my opinion, Attorney Kouten's conduct, which included this concurrent and subsequent representation of the other defendants, fell below the standard of care, skill, diligence, and loyalty expected of lawyers in South Carolina. This deficient conduct proximately caused injury to Ms. Shaw Baker and constitutes legal malpractice.

15. Application of Rules of Professional Conduct in Legal Malpractice actions: In *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996), the Supreme Court held that violation of the rules of professional conduct was not per se

malpractice, but experts could rely upon the rules in expressing opinions about whether a lawyer accused of malpractice had violated the standard of care required of lawyers.

16. I have been retained as an expert witness by counsel for plaintiffs. My expert opinions are based on the allegations of the Complaint and the evidence available to me at this time; these opinions are, therefore, subject to expansion and modification as further evidence or issue develops.

FURTHER, AFFIANT SAYEATH NAUGHT.

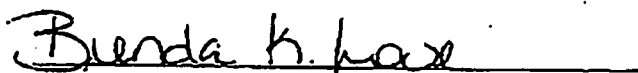
By 

Mark W. Hardee

Subscribed and sworn to before me

This 16th day of November, 2012.

(SEAL)



Notary Public of South Carolina

My Commission Expires: Dec 20, 2016

MARK W. HARDEE
THE HARDEE LAW FIRM
2301 DEVINE STREET
COLUMBIA, SOUTH CAROLINA 29205

CURRICULUM VITAE

Professional Contact Information:

- Phone: (803) 799-0905
- Fax: (803) 799-0470
- E-Mail: mwhardee@bellsouth.net

Education:

- University of South Carolina School of Law, Columbia, South Carolina, 1986 J.D.
- College of Charleston, Charleston, SC, 1983 B.A., Major: Political Science

Birth Information:

- 1961, Columbia, South Carolina, United States of America

Bar Admissions:

- South Carolina, 1986
- U.S. District Court, 1988
- U.S. Court of Appeals 4th Circuit, 1995
- U.S. Court of Appeals 5th Circuit, 2000
- U.S. Court of Appeals 10th Circuit, 2002
- U.S. Court of Federal Claims, 1999
- U.S. Court of Appeals Federal Circuit, 2001

Work History:

- Assistant Public Defender, Richland County Public Defender's Office, 1986-1988
- Attorney, Lewis Babcock & Hawkins, 1988-2003
- Attorney, The Hardee Law Firm, 2003-Present

12-CP-10-1332

AFFIDAVIT OF LISA FISHER

PERSONALLY APPEARED, Lisa Fisher, who, first being duly sworn, deposes and says:

FILED
2012 NOV 26 AM 11:57
JULIE ARMSTRONG
CLERK OF COURT

1. My name is Lisa Fisher.
2. I am a citizen of the United States, over 18 years of age, and of sound mind.
3. The sources of my information and the grounds for my beliefs herein are my personal knowledge and the documents in my possession.
4. I am a licensed attorney in good standing in the State of California.
5. Alice Shaw Baker was my great aunt. I had maintained contact with my Aunt offering support and love prior to learning that she was placed under a temporary conservatorship in or about September 2008. My mother and I rushed to be with her and help her. We were very close, and we wanted to help. Alice had always stated that her monies, real property and estate were going to animal charities and we supported her desire to benefit these charities. She had informed me that she had safeguarded her Will by making her "friend" her executor, so that the monies would go to an animal rescue owned by Kay Passailaigue Slade. This seemed like a good plan, and I never tried to interfere.
6. She also informed me that her friend Bessie Huckabee was her agent under her powers of attorney, and would take care of her in the event she needed help. This "friend" Bessie Huckabee had promised to help her so that she would not have to live in a nursing home.
7. When I went to Charleston, I sought assistance from these "friends" to ensure that Alice was happy. Even though they had interfered with her and represented to her that, as she

aged, ~~they~~ would step in and take care of her, they refused all of my requests. When my great aunt learned of this betrayal, she wept and could not believe that her friends had denied to help her. However, she was still under the impression that these friends were associated with animal charities.

8. My mother and I stepped in, and the court appointed me as her conservator and guardian. I took steps to help her so that she could maintain as much independence as possible.
9. When I learned that Kay Passailaigue Slade did not "own" an animal charity, and was not even associated with one, I told Alice. On January 1, 2009, Alice revoked her Will, because she knew that they had lied to her and pretended to own these charities. She was very hurt and upset. She wanted her monies to go to animal charities. This desire is supported by other documents that I have obtained, all demonstrating that the monies were to go to animal charities after her death.
10. Huckabee and Slade had always represented that they would provide or arrange care for her. However, at the time they made said representations, they had no intention of fulfilling them. I later learned that a third person, Sandra Byrd, was involved and had notarized documents which also interfered with my great aunt's real intentions.
11. On April 5, 1996, Alice Shaw-Baker executed a General Durable Power of Attorney making Huckabee her attorney-in-fact, expressly creating a fiduciary relationship between Huckabee and herself and prohibiting Huckabee from using her powers for her own benefit.
12. Also on April 5, 1996, Alice Shaw-Baker executed a Health Care Power of Attorney making Huckabee her health care attorney-in-fact with Slade as the alternate, which, among

other provisions, authorized hiring and firing medical, social services, and other support personnel for Alice Shaw-Baker's care.

Neglect, Isolation, and Abandonment of Alice Shaw-Baker as a Vulnerable Adult

13. Alice Shaw-Baker was suffering from dementia.
14. I learned that by 2007, her home was cluttered and not livable, and she lacked adequate food and proper hygiene. I was greatly concerned about her, but knew that she had made arrangements to have Huckabee and Slade help her.
15. Despite the representations on which Alice Shaw-Baker had relied, Huckabee and Slade did not provide care for her or ensure that she had a livable home, adequate food, or proper hygiene.
16. I learned that Huckabee, Slade, and Byrd were not visiting Alice Shaw Baker, they were not bestowing on her any love, care, or concern. At the depositions in the Will contest, they clearly demonstrated animosity toward my great aunt. Slade later represented that she had taken care of my great aunt, at a time when I was the appointed conservator/guardian. Alice Shaw-Baker was alone and without assistance.
17. Huckabee and Slade failed to disclose Alice Shaw-Baker's condition to me, other of Alice Shaw-Baker's family members, or authorities prior to the intervention of the Charleston, South Carolina, Police Department.
18. On July 31, 2008, a representative of the Charleston Police Department's Elder Support Line filed a Petition for a Finding of Incapacity and for Appointment of Guardian and Conservator for Alice Shaw-Baker.

19. Thereafter, my mother, Betty Fisher, and I traveled to Charleston, South Carolina from California on several occasions to assist Alice Shaw-Baker.
20. When I requested that Huckabee and Slade assist Alice Shaw-Baker, they refused.
21. When Alice learned of their refusal to help her, she cried and was utterly confused. This confusion escalated and caused her to be more agitated and troubled. This confusion, which was aggravated, by the pain in knowing her friends were not going to help continued throughout the conservatorship until her death.
22. At first, Temporary Co-Guardians and a Temporary Conservator were appointed for Alice Shaw-Baker, and, during that time, I served as one of the Temporary Co-Guardians.
23. Pursuant to an Order of the Probate Court, Alice Shaw-Baker's house was cleaned, organized, and renovated.
24. Caregivers were hired to supervise Alice Shaw-Baker's daily meals, hygiene, and medical needs.
25. On October 29, 2008, I was appointed as her permanent Guardian and Conservator.
26. During my appointment, Huckabee and Slade did not visit or call Alice Shaw Baker. They did not call to inquire about her care. When they learned I was taking her to California, they went to the hospital and intentionally caused her grief. In my presence, they talked about their personal problems, ignored Alice, and showed no care or concern about her well being. They interfered with my discussions with the nursing staff and doctors, and by and through their counsel, Defendant Kouten, interfered with my orders regarding Do not resuscitate orders. As outlined by Candace Rickborn, they told her to "go to her dogs". I had to ask them to leave the hospital room, because they were

interfering with my attempts to help her and their callous attitude toward Alice. The affidavit of Candace Rickborn even notes that Alice asked Huckabee to leave, when she came to the hospital. Due to their interference with the proper medical care I had obtained for her, the hospital put Alice Shaw Baker on DNR status twice, and failed to provide her with the treatment she needed without my knowledge.

27. On February 25, 2009, the very day I went to fly on the medical plane with Alice to go to California, Alice Shaw-Baker died. My mother and I were, and are, grief stricken at her loss.

Attorney Peter Kouten's actions as Guardian ad litem and concurrent representation of the Other Defendants:

28. Despite Alice's efforts and desire to live independently, the Probate Court went forward with the petitions for conservatorship and appointed Temporary Conservator/Guardians without notice to any family. Immediately upon learning of her troubles, My mother (Alice's niece) and I rushed to her side.
29. Pursuant to the mandatory requirements under S.C. Code Ann. § 62-5-303, Judge of the Probate Court appointed Attorney Peter Kouten as visitor, guardian ad litem, and attorney for Alice Shaw Baker. On October 20, 2008, he filed a visitor's report. (Attached hereto is a true and correct copy of said report marked as Exhibit A).
30. Peter Kouten was then appointed to represent Alice at the trial in opposition to the conservatorship. At the conclusion of the trial, the court ordered him to continue as Alice's visitor, visiting her every week until her death.

(The last week in December, he went every day. This while representing Defendants.)

31. Defendant Kouten submitted numerous bills and reports to the court as Attorney, Visitor, and Guardian ad litem. For example, On December 23, 2008, Attorney Kouten submitted his monthly visitor's report to the Probate Court. (Attached hereto is a true and correct copy of said report marked as Exhibit B) Accompanying that report was a bill for services rendered to Alice Shaw Baker, directed to me, requesting payment in the amount of \$4,500.84. (Attached hereto is a true and correct copy of said bill marked as Exhibit C, including the prior order of November 12, 2008 in the amount of \$3,915.84)
32. He also e-mailed me wherein he informed me that he (and his sons) were removing (and interfering) with Alice Shaw Baker's property without my consent. (See attached hereto is a true and correct copy of said e-mail marked as Exhibit D, emphasis added.)
33. Attorney Kouten's action in analyzing Alice property, without my prior authorization was an interference with my ability to help Alice and my status as guardian and conservator. On December 18, 2008, Attorney Kouten e-mailed me and told me in part:

"I have been checking on Alice and she has been in good spirits. I will continue to visit until the court relieves me. Please call me if you need me to do anything for Alice. I have yet to see any report from doctors. I will keep you posted."

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit E).

34. His actions were so imposing that they interfered with my powers as the Guardian/Conservator, because he was acting as the investigating arm of the court. I had no knowledge about any relationship of Attorney Kouten with Huckabee, Slade, and Byrd, and that information provided to him would be transmitted to them in their scheme to gain control of the assets.
35. I maintained contact with him to ensure compliance with the probate court's order. In Attorney Kouten's e-mail, the communications concerning the doctor and the court's orders, included his statement: "Be assured that I will help check on Alice as long as you like. Peter" (Attached hereto is a true and correct copy of said e-mail marked as Exhibit F, emphasis added)
36. In another e-mail, on January 2, 2009, Attorney Kouten disclosed, not only that he had "ex parte" communications with the court about Alice, but that he wanted to interfere with my function, as guardian :

"I spoke with the court on Wednesday and they suggested mailing her [Former temporary guardian Jane Orenstein] a confirmation of our discussion after we speak. I will make sure she knows:

1. She is no longer appointed in any capacity as it applies to Alice.
2. any contact re: Alice should come through me or John or Lisa."

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit G, emphasis added)

37. On January 5, 2009, Attorney Kouten communicated directly with the former temporary co-guardian, Jane Orenstein, stating emphatically:

" The important outcome is that you are noticed that I am continuing in my duties as Court-Appointed Visitor."

(Attached hereto is a true and correct copy of said e-mail marked as Exhibit H, emphasis added)

38. I sent Attorney Kouten gift certificates for work that his children did on Alice Shaw Baker's behalf, which he acknowledged. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit I). I did not request that he do any work on the Alice's behalf.

39. With said e-mail, he attached his weekly report demonstrating that he was continuing to report to the court on Alice's care. (Attached hereto is a true and correct copy of said e-mail marked as Exhibit J). Said e-mail included an invoice requesting payment of fees in the amount of \$1,275.00. (Attached hereto is a true and correct copy of said invoice marked as Exhibit K).

40. At the same time, he included an order regarding his fees. (Attached hereto is a true and correct copy of said proposed order marked as Exhibit L).

41. On January 14, 2009, Attorney Kouten e-mailed me regarding the care and doctor's reports for Alice:

"Please find attached visitor's letter to the Court concerning Dr Waid's evaluation. It

seems that the next step in satisfying the Court Order is to receive and forward the "medical evaluation by a medical doctor." Further, Dr. Waid sought an evaluation from a "Geriatric Psychologist." This appointment should be set and final evaluation and report should be forwarded to the Court. When these items are complete, it appears that the Court would like to set a status conference to determine the procedure to back off of 24 hour care if warranted."

(Attached hereto is a true and correct copy of said email dated January 14, 2009 marked as Exhibit M, emphasis added).

42. In said e-mail, he forwarded a letter that he directed to Elizabeth Sykes of the Probate Court re: the report from Dr. Waid. This report outlined the cognitive and neuropsychological condition of Ms. Shaw Baker. (Attached hereto is a true and correct copy of said letter marked as Exhibit N).
43. Within less than a month, Alice Shaw Baker was hospitalized in an attempt to regulate her medication, when the caretakers claimed she would not take her medicine.
44. The caregivers had not followed my instructions, so I had decided to bring Alice to California so that I could take of her. I went to the hospital to bring her to California, and I didn't even rent a car. I took a cab to make sure Alice and I were on that plane. Instead she died that same day.
45. However, prior to her death, I learned that Defendant Kouten was instructing Huckabee and Slade at the hospital on what to do and that he was interfering with my instructions to

the hospital. He interfered with my authority, even convincing the hospital that he was in charge. I had to re-inform them who I was, even though they had my letters of conservatorship/guardianship. He informed the hospital to communicate with Huckabee and Slade. I found out after her death that Alice even had to ask them to leave when they were in her hospital room. Kouten admitted to me at the hospital that he spoke to the nurses on several occasions, because "they knew him since he worked with the Court." He told me that I could not go against the Power of attorney, despite knowing that the power of attorney was revoked by the Court in October 2008 and that I was acting in Alice's best interests. I was shocked and couldn't believe it, but I still did not know the magnitude of his interference until my great aunt died.

46. Peter Kouten admitted going to the hospital, admitted to communications and advocacy for Defendants, and within moments of Ms. Shaw Baker's unbearable death on February 25, 2009-he admitted having an appointment with Huckabee and Slade the very next morning. He had already advised them to get the keys from the caregiver, Candace Rickborn, and I had to act fast to protect the property. I was extremely upset as Alice had just died. I took control of the house so that I could properly report to the court.
47. On March 2, 2009, he filed a Petition for Informal Probate seeking the appointment of Bessie Huckabee, and failed to give notice to my mother, Betty Fisher, (Alice's niece). (Attached hereto is a true and correct copy of Petition for Informal Probate marked as Exhibit O, emphasis added).
48. While my mother and I have filed a Will Contest in April 27, 2009, this relief is insufficient to undue the harm caused

by Attorney Kouten. Even so, he filed on behalf of Huckabee, Slade, and Byrd, an answer in the Will contest matter. (Attached hereto is a true and correct copy of said answer marked as Exhibit P)..

49. We have diligently sought to prosecute the Will contest case, have been forced to appeal prior decisions, and demanded that Attorney Kouten withdraw as counsel for Huckabee, Slade, and Byrd. He refuses.
50. Even after the court ordered him to file a bond on behalf of his client Bessie Huckabee, he failed to file the bond and he also failed, and continues to fail to this day, to report the fact that \$16,000.00 of Alice's monies are in the hands of his client. By statute and court order, these monies require a bond.
51. He has used information that he obtained by representing my aunt to help his "clients". He even told the caregiver, Candace Rickborn, to look for documents and not tell me right after my great aunt's death.
52. His representation has caused great harm to my aunt and her estate, especially in light of the fact that he knew that she wanted all of the monies to go to animal charities and that she had revoked the other will.

ADDITIONAL DOCUMENTS OBTAINED DEMONSTRATING A FIDUCIARY DUTY:

53. Attached hereto are true and correct copies of the respective Durable power of attorney and Health Care Power of Attorney naming Bessie Huckabee, agent in marked as Exhibits Q and R.

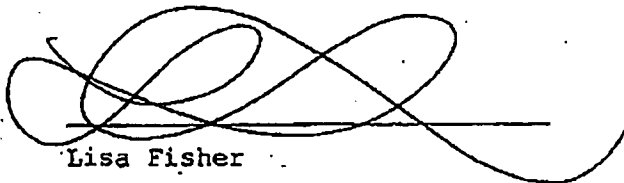
REMEDY REQUESTED:

54. The actions set forth above by Defendants demonstrate the fact that my great aunt was left isolated and neglected by

these "friends", abandoned by them in her time of need, and subjected to a breach of fiduciary duty by all Defendants. These facts and as outlined in the concurrently filed affidavits of Candace Rickborn, David M. Kessler, and Mark Hardee, Esquire clearly demonstrate that triable issues of fact exist concerning the causes of action alleged in this contest. Had Betty Fisher not filed this action, in her capacity as real representative, the damages suffered by Alice Shaw Baker would have been lost.

55. I respectfully request that the court deny the motion to dismiss and/or motion for summary judgment.

Further affiant sayeth naught.



Lisa Fisher

Long Beach, California

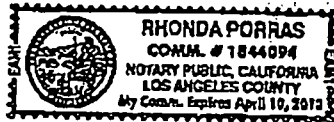
November 21, 2012

[See Attached Notarization]

State of California
County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this 21st
day of November, 2012, by Lisa Fisher

proved to me on the basis of satisfactory evidence to be the
person(s) who appeared before me.



(Seal)

Signature

A handwritten signature in black ink, appearing to read 'Rhonda Porras', written over a horizontal line.

Attached To: Affidavit of Lisa Fisher

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

Fisher,)
Plaintiff,)
v.)
Bessie Huckabee, etal.,)
Respondents.)

MEMORANDUM SUPPORTING
SUMMARY JUDGMENT AND DISMISSAL
AND OPPOSING
DISQUALIFICATION AND REMOVAL
OF COUNSEL

NOV 28 AM 9:02
JULIE ARMSSTRONG
CLERK OF COURT

FILED

INTRODUCTION

Defendant, Peter A. Kouten, Esquire, is in opposition to his removal a counsel for the Defendants in this matter. Plaintiff Betty Fisher claims to be the "real representative for Alice Shaw-Baker" although she has never been formally or informally recognized as such. Counsel for the Defendants in this matter has agreed to represent each Defendant and their interests in these matters are not adverse.

FACTS

Alice was identified by the City of Charleston as one who would be considered vulnerable. She was getting lost in the neighborhood while walking and she would make phone calls at odd hours as her sleep schedule was maladjusted. When she was identified by the City of Charleston Elder Support Coordinator, Elisabeth Spencer, it became apparent to Ms. Spencer that Alice needed help. Emergency appointment of temporary guardian and temporary conservator were sought. The probate court appointed Defendant Kouten, attorney and Guardian ad litem for Alice Shaw-Baker. Defendant Kouten was not involved with the emergency appointment or temporary appointment. In meeting with Alice, it was apparent she would do anything to stay in her house, although

she has long-term care in place, so that she could smoke. By the time Defendant Kouten was appointed, certain fire hazards had been removed from the house. The house had been painted, a smoke detection system was added and new carpeting was installed. All her belongings, including files and papers, were reviewed and placed in a briefcase prior to my appointment. In the Visitor's Report, Defendant Kouten indicated that Alice's attorneys were John Hughes Cooper and Cain Denny. She later informed me they were not her attorneys. They were instrumental in cleaning the house, painting, reviewing documents, throwing out trash, ensuring Alice had a hotel reservation when the carpet was installed, et cetera. The report also indicated that Alice did not believe she needed a guardian or conservator, but if one were to be appointed, she would want Lisa Fisher. Alice wanted Lisa as guardian because she claimed that Lisa would allow her to stay in her house so she could smoke. The probate court determined that Alice was incapacitated. Defendant Kouten did not meet the other Defendant's prior to the final hearing for permanent appointment of guardian and conservator. I visited Alice on numerous occasions per the orders of the probate court. Her death came as a surprise. Defendant Bessie Huckabee was named as personal representative in Alice's Last Will. She called me after Alice died and she asked me to assist her in the administration of the estate. I agreed to assist her in the estate administration as it was in furtherance of Alice's last wishes. It is important to note that the probate court, upon final appointment of guardian and conservator, sought and was furnished with a copy of Alice's last will. Defendant Huckabee was appointed personal representative after Alice's original Last Will and Testament was presented to the probate court estate division by attorney for the Plaintiffs. Petition was filed by Plaintiffs to void appointment of personal

representative, contest the Will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. These actions were moved to Charleston County Court of Common Pleas by statutory right. Defendant Kouten assisted Defendants Huckabee, Passailaigue and Byrd in providing Answers to the Complaint in the aforementioned action.

Plaintiff sought a Temporary Restraining Order against the personal representative of the estate which was granted following a hearing on May 22, 2009. The court's order of restraint stated that the personal representative was restrained from doing everything, leaving the estate unprotected. On or about May 28, 2009, Defendant Kouten filed a motion for modification and a motion for reconsideration on behalf of the estate personal representative seeking to allow the personal representative to administer the estate and limit the restraint to distribution of estate assets. At a hearing heard on June 8, 2009, modification was granted as in the best interest of the estate. The modification ruling was appealed to the South Carolina Court of Appeals and was affirmed by a three judge panel. It was appealed en banc and affirmed again. Finally, Plaintiffs Writ was denied on June 2, 2011 by the South Carolina Supreme Court. The order that had been appealed dealt strictly with the modification of a Temporary Restraining Order. No lower court has heard any issues pertaining to any substantive issues in these matters. This did not prevent Plaintiffs as Appellants from listing numerous additional issues on appeal. The process was time consuming and costly and was a huge waste of resources as the personal representative was merely seeking the ability to fulfill her duties as required by statute.

During the appeal process, Plaintiffs did not seek hearing on the Will Contest and all other unrelated matters. Plaintiff Lisa Fisher, after being discharged as conservator, filed and affirmed a final accounting with the probate court. Plaintiff Lisa Fisher was granted extension to turn over estate assets until the merits hearing could be held. As two and a half years passed without resolution, the probate court sought accounting of estate assets held by conservator. When Lisa Fisher provided the accountings, it was disturbing to note that she was spending estate money without permission or authority from the probate court. The probate court, upon hearing of the matters of accounting, ordered that a special fiduciary be appointed to receive the estate assets. That order is currently on appeal and the final accounting and subsequent accountings have not been approved by the probate court. Plaintiff Lisa Fisher remains in possession and control of the estate assets. There are no less than five causes of actions and/or appeals currently filed by Lisa and Betty Fisher. It will be more than four years from Alice's death before the will contest is heard.

ANALYSIS

I. MOTION FOR SUMMARY JUDGMENT and DISMISSAL OF ACTION

- A. Plaintiff Betty Fisher filed a Complaint in this Court on April 27, 2009 which alleges wrongdoing by Defendants and has refused to seek final hearing in this matter. The aforementioned Complaint filed under 2009-CP-10-3010 has as its base the same claims and therefore, this action should be dismissed under South Carolina Rules of Civil Procedure Rule 12(b)(8).
- B. Plaintiff Betty Fisher has filed her action in the improper court and the circuit court lacks jurisdiction over this matter.
- C. Plaintiff Betty Fisher has yet to obtain a favorable determination that she has standing in any matter. This matter should be dismissed without prejudice until Plaintiff prevails on the determination of the validity of Alice Shaw-Baker's Last Will and Testament.

A.

Plaintiff's original complaint was filed more than three years ago and Plaintiff has not sought hearing on the core issue of the determination of the validity of the Last Will and Testament of the decedent. The Plaintiff sought Temporary Restraining Order of personal representative (P.R.) of the estate and the Court's restraining order indicated that the P.R. was restrained from all things. Upon motion for reconsideration, the Court allowed the P.R. to continue administrative duties of the estate. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, appealed to the South Carolina Court of Appeals, the Court's Order reconsidering the TRO and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, sought appeal en banc and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, sought writ of certiorari to the South Carolina Supreme Court. The petition to the Supreme Court, which was denied, has nothing to do with the validity of decedent's Last Will, yet, Plaintiff has declined to seek hearing and determination of the Last Will's validity.

Co-Plaintiff of the prior action, Lisa Fisher, was the conservator for the decedent prior to her death. Lisa Fisher was discharged by the probate court as conservator and was ordered to turn over the estate assets to a financial intermediary. Lisa Fisher has filed appeal of the probate court order and has refused to turn over the estate assets. Evidence exists that Lisa Fisher has continued to expend estate assets without authority and after she had been discharged as conservator.

Plaintiff has merely to have this Court determine whether the Last Will is valid or it is not. All other issues are directly related to the issue of the validity of the Last Will. Defendants ask that the Court dismiss this action and order the Plaintiff to seek final hearing in the prior Complaint.

B.

The probate code specifically addresses the circuit court's concurrent jurisdiction for wrongful death and survival actions. Other claims must originate in probate court, they may be removed to circuit court. S.C. Code Section 62-1-302(d)

Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo. Id. Plaintiff is asking this Court to hear a case over which it has no original or concurrent jurisdiction. The probate court has exclusive jurisdiction over matters involving decedent's estates. See Mayer v. M.S. Bailey & Son, 347 S.C. 353 (Ct. App. 2001) (noting action against bankers for breach of contract, breach of contract accompanied by fraudulent act, breach of fiduciary duty, and violation of the SCUTPA concerning administration of trust filed in circuit court had been dismissed without prejudice for lack of jurisdiction before it was brought in probate court). Based on this Court's lack of jurisdiction, the Plaintiff's Complaint should be dismissed.

C.

Plaintiff and her representatives had access to decedent's home when she was deemed a vulnerable adult. Plaintiff and her representatives had access to the decedent's records, files and the entire contents of the house. Plaintiff and her representatives removed contents of the home including the decedent's Last Will. Upon the death of decedent, it was a representative for the Plaintiff who was in possession of the original

Last Will and who turned over the original Last Will to the probate court so that Respondent Bessie Huckabee could be appointed personal representative. The probate court, during the guardianship action, sought copy of the Last Will for the court file and the Last Will copy was filed with the probate court therapeutic division by the guardian or her representative. Those with access to the decedent's records and files include the Court-Appointed Guardian, Lisa Fisher, the Plaintiff, Betty Fisher and her representatives. This matter should be dismissed with prejudice until Plaintiff seeks a hearing on the determination on the validity of Alice Shaw-Baker's Last Will and Testament.

Betty Fisher, although she indicates in her pleading captions, "real representative for Alice Shaw-Baker" has never been granted such status and, therefore, lacks standing and authority to file this action. A personal representative of a decedent has the same standing to sue and be sued on behalf of the estate. S.C. Code Section 62-3-703 A personal representative may properly prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate. S.C. Code Section 62-3-715 Betty Fisher is not the personal representative for the estate of Alice Shaw-Baker. As such, she has no authority to sue anyone on behalf of the estate or Alice Shaw-Baker. For this reason, Plaintiff's action should be dismissed.

CONCLUSION

Based on the above, the Plaintiff's action should be dismissed for lack of jurisdiction, authority and standing to sue on behalf of the decedent, Alice Shaw-Baker.

II. REMOVAL OF COUNSEL

- D. Expense and possible delay inherent in any disqualification of counsel, with additional reasons, may qualify as "substantial hardship" precluding disqualification where attorney's disqualification creates the loss of extensive

knowledge of a case based upon a long-term relationship between the clients and counsel and substantial discovery conducted in the actual litigation.

E. The Sixth Amendment of the United States Constitution has been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice.

F. The Plaintiff alleges conflict between Defendants, however, based on personal knowledge, there is no apparent conflicts between the Defendants in this case and the decedent, Alice Shaw-Baker.

D.

Expense and possible delay inherent in any disqualification of counsel, with additional reasons, may qualify as "substantial hardship" precluding disqualification where attorney's disqualification creates the loss of extensive knowledge of a case based upon a long-term relationship between the clients and counsel and substantial discovery conducted in the actual litigation. S.C. Appellate Court Rule 407, Rules of Prof. Conduct, Rule 3.7. Removal of counsel at this stage would cause substantial hardship on all Defendants and for that reason, Plaintiff's motion to disqualify and remove counsel should be denied.

E.

The Sixth Amendment of the United States Constitution has been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant. Further, because such a denial is not a trial error, meaning a constitutional error that occurs during presentation of a case to the jury, but a structural

defect, in that the constitutional error affects the framework of the trial, the Supreme Court has held that the decision is not subject to a "harmless error" analysis. Therefore, based on the Sixth Amendment of the U.S. Constitution, Plaintiff's motion to disqualify and remove counsel should be denied.

F.

The Plaintiff alleges conflict between Defendants, however, there is no apparent conflicts between the Defendants in this case and the decedent, Alice Shaw-Baker.

Plaintiff cites the *Townsend v. Townsend* case as support for her claims. 323 S.C. 309 (1996) Although the *Townsend* case addresses issues regarding conflict of interest with a divorce lawyer representing a father and who had previously acted as guardian ad litem for the minor child. The court specifically indicates that this family court matter should be used "to clarify for the Bench and Bar some of the ethical and other responsibilities of attorney guardians ad litem in the context of *custody or support actions*." (emphasis added) This case is not on point. The matter at issue is whether the prior representation did or could have revealed confidential information in the first representation that would be of significance in the second. Attorney never met with Alice privately on a one-on-one basis. Alice was under twenty four hour care. There was no confidential information revealed to the attorney. There was no information revealed to attorney that was not provided to the probate court, there can be no conflict of interest along these grounds.

Alice Shaw-Baker drafted a Last Will and it was provided to the probate court by attorney for the Plaintiff on two occasions. The probate court was aware of the last

intentions of Alice, and as there was no objection to the Last Will by any party, seeking to uphold the Last Will would be in the best interest of Alice.

Plaintiff alleges that Attorney must withdraw under "certain circumstances."

Plaintiff has alleged that she is aware of the entirety of duties of a fiduciary, the entirety of ethical duties of an attorney, and the entirety of statutory duties of a guardian ad litem.

Further, Plaintiff alleges that attorney has violated every duty imposed upon him. Plaintiff has provided no less than fifteen exhibits which all indicate that attorney acted in

furtherance of the best interests of Alice Shaw-Baker while satisfying the orders of the probate court. There was no contemporaneous objection by the guardian to any acts of the guardian ad litem. For these reasons, Plaintiffs motion to Disqualify and Remove Counsel

should be denied.

CONCLUSION

Based on the above, the Plaintiff's Motion to Disqualify and Remove Counsel should be denied.

Respectfully Submitted,



Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29457
(843) 670-3919

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

BETTY FISHER, as Real Representative)
for Alice Shaw-Baker,)

Plaintiff,)

v.)
BESSIE HUCKABEE et al)

Defendants,)

SUPPLEMENTAL MEMORANDUM
IN OPPOSITION BY PLAINTIFF BETTY
FISHER, AS REAL REPRESENTATIVE
FOR ALICE SHAW-BAKER, TO
MOTION FOR SUMMARY JUDGMENT,
AND DISMISSAL OF ACTION

AS REQUESTED BY THE COURT ON
NOVEMBER 28, 2012

COMES NOW Plaintiff Betty Fisher, as Real Representative for Alice Shaw Baker
("Plaintiff"), submitting this supplemental memorandum in Opposition as requested by the Court at the
hearing heard on November 28, 2012 brought by Defendants re: Summary Judgment and Dismissal.
This Court asked for briefing on the following issues:

- 1) Distinctions between "personal representative" and "real representative" for purposes of
bringing action;
- 2) Whether a "real representative" may bring a "survival action" on behalf of the Estate for:
(a) Violations of the Omnibus Act; (b) Legal Malpractice; (c) Breach of Fiduciary Duty.

Additionally, the Court allowed plaintiff to briefly address the issues set forth by Defendants in
the memorandum filed by the defendants at the time of the hearing.

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I.
PRELIMINARY CONCERN:
CONCURRENT JURISDICTION WITH THE PROBATE COURT TO BRING THIS ACTION

Pursuant to the South Carolina Constitution, Article 5, section 12:

"Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article."

The only limitation on South Carolina's survival statute, Section 62-1-302 (b) of the South Carolina Code, is the above stated Constitutional provision, which emphasizes the limited application of the exclusivity of probate jurisdiction.

To fully understand the relationship of the survival statutes to this matter, statutory interpretation must be considered. The court in *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) held that: "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect."

Moreover, one of the cardinal rules of statutory interpretation is that words of a statute should be accorded their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. (See *Estate of Gulde v. Spooner*, 318 S.C. 335, 457 S.E.2d 623 (Cl.App.1995).)

The court in *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Cl. App. 2003) explained further the impact that statutory construction must have: "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." "All rules of statutory construction are subservient to the one that legislative

intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (Citations omitted)

Therefore, the "plain ordinary" meaning of Section 62-1-302 (b) supporting protection of the vulnerable and disabled adults in South Carolina leads only to the conclusion that plaintiff has the right to proceed on Alice Shaw-Baker's behalf.

"The court's jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate." (Emphasis added)

This "concurrent" jurisdiction is bolstered by the plain language of Section 62-3-804(2) of the South Carolina Code which allows a tort claimant to sue the personal representative of an estate in any court.

Therefore, under the accepted principles governing interpretation of statutes in South Carolina, Plaintiff, on behalf of Alice Shaw-Baker, is entitled to pursue this action under concurrent jurisdiction, or in any court under § 62-3-804(2) against all Defendants.

II.
THE LEGISLATURE AUTHORIZES A "REAL REPRESENTATIVE" TO BRING A SURVIVAL ACTION, THEREFORE DEFENDANTS' MOTION MUST BE DENIED.

The language governing statutory interpretation, referenced above, also controls with regard to plaintiff's standing as "real representative" to protect the rights of Alice Shaw Baker.

South Carolina Code Ann. § 15-5-90 (1976) provides that:

"[c]auses of action for and in respect to... any and all injuries to the person or to personal property shall survive both to and against the personal or real representative... of a deceased person... any law or rule to the contrary notwithstanding." (Emphasis added)

It is well settled that South Carolina's general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions. These exceptions are few and do not include any of plaintiff's causes of action, on behalf of Alice Shaw Baker.¹

Contrary to Defendant Kouten's assertions, The "survival action" is distinctly different, both in purpose and procedure, than the wrongful death statutes. With regard to wrongful death, the legislature was specific about the person who can bring the action. South Carolina Code Ann. § 15-51-20 provides:

"Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person."
(Emphasis added)

The court specifically provided that wrongful death actions must be prosecuted by the "executor" or "administrator". The legislature could have done the same thing in the "survival" action, instead they specifically gave authority to the "real representative" to bring this action in § 15-5-90. The damages incurred and the relief sought in a survival action are for Alice Shaw-Baker's damages. The wrongful death statute provides a remedy for the spouse, child, parent, or heir of an injured party when a person commits a wrongful or negligent act causing the injured party's death. (S.C. Code Ann. §§ 15-51-

¹ It is well settled that "[a]ny cause of action which could have been brought by the deceased in his lifetime survives to his representative under [section 15-5-90]." (See *Layne v. Int'l Bhd. of Elec. Workers Local*, 382, 271 S.C. 346, 352, 247 S.E.2d 346, 350 (1978).)

Historically, there are some actions which the Supreme Court have recognized as exceptions to section 15-5-90's broad language. These actions involve malicious prosecution, slander, and fraud and deceit. (See *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958)) ("It is interesting to note that with a liberal construction [of the general survival statute] this Court has held that actions for malicious prosecution, slander, and fraud and deceit do not survive . . .").

Survivability is determined by the "nature and substance of the cause of action, rather than the form of the remedy . . ." (See *Ward v. Atlas Constr. Co.*, 276 S.C. 346, 349, 278 S.E.2d 621, 623 (1981); see *Page v. Lewis*, 203 S.C. 190, 26 S.E.2d 569 (1943).)

10, 15-51-20 (Supp. 2005).) Any recovery directly benefits the individual rather than the decedent's general estate in a wrongful death action. (See *Lester v. McFaddon*, 415 F.2d 1101, 1103 (4th Cir. 1969).)

With this understanding, the federal rule governing survivability of an action is instructive. It states that an action for a "penalty" does not survive, although "remedial" actions do. (See *Faircloth v. Finesod*, 938 F.2d 513 (1991).) All of plaintiff's causes of action are "remedial" and all are to recover for Alice Shaw-Baker's damages.

Justice demands that plaintiff will be permitted to prosecute actions on behalf of her aunt, that could not and would not be prosecuted by the "informal personal representative," and those who took advantage of Alice Shaw Baker *during her life*.

III.
PLAINTIFF'S CAUSES OF ACTION, ON BEHALF OF THE DECEDENT, ALICE SHAW-BAKER ARE PROPER SURVIVAL ACTIONS WHICH ARE PERMITTED UNDER THE BROAD LANGUAGE OF SECTION 15-5-90, THEREFORE DEFENDANTS' MOTION MUST BE DENIED.

As set forth below, all of the actions brought by plaintiff are proper survival actions.

A. Omnibus Adult Protection Act.

"A cause of action created by statute survives when and only when some provision for its survival is made in the statute itself, or in some other statute." (See 1 C.J.S. Abatement and Revival §151, at 206 (1985); see 1 Am. Jur. 2d Abatement, Survival, and Revival §53 (1994), emphasis added).

In this context, the issue is does the Omnibus Adult Protection Act survive? It survives under the provisions of 15-5-90 and a close reading of the entire statutory scheme protecting vulnerable adults. The court in *Williams Garrett v. Murphy*, 106 F.Supp.2d 834 (2000) held that the legislature intended to create a Private cause of action for vulnerable adults subject to abuse. With respect to civil

enforcement, *Williams Garrett, supra*, outlines that the Act is "to provide civil and criminal penalties for abuse, neglect, and exploitation," of the disabled (S.C. Code Ann. § 43-35-5(9).) It also allows action by the Attorney General against persons or facilities for the failure to exercise reasonable care. (See § 43-45-80.)

By this dual application, and the further definition of neglect under S.C. Code § 43-35-10, survival actions were contemplated:

"Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death." (Emphasis added)

Common sense dictates that the ability to enforce the law must continue after death to ensure that wrongdoers will be either prosecuted or suffer some liability. (See also, S.C. Code § 43-35-35 which outlines the manner to report deaths where abuse or neglect are suspected.)

The court in *Amisub of South Carolina, Inc. V. Passmore*, 316 S.C. 112, 447 S.E.2d 207 (S.C. 07/25/1994) went even further by providing *third parties*, the hospital, standing to assert the cause of action against a husband who refused to take financial responsibility for the care of his seriously ill wife. A close reading of the case demonstrates that the vulnerable person, the wife, died during the proceedings. (See fn. 1) Therefore, this also supports Omnibus Adult Protection Act as a remedial statutory scheme meant to afford victims and their estates with the means for recovery for harm suffered by a now deceased victim.

B. Breach of Fiduciary Duty

Issues of Breach of Fiduciary duty are raised in cases where individuals suffer wrongdoing by those with fiduciary relationships. (See *Osprey, Inc. v. Cabana Limited Partnership*, 340 S.C. 367, 340 S.C. 367 (2000) [cause of action for Breach of Fiduciary abuse allowed to proceed].) These actions have

also been permitted when an attorney misleads individuals concerning their estate inheritance. (See *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991); see also, *Williams-Garrett v. Murphy*, *supra* [for exploitation of a 90 year old vulnerable adult].)

Under the clear language governing survival actions, plaintiff must be permitted to proceed. Both to ensure recovery for the wrongdoing to Alice Shaw Baker, and to preclude the running of the statute of limitations.

C. Legal Malpractice

Case law permits a representative to bring a legal malpractice action on behalf of an estate. For instance, the court in *Sims v. Hall*, 592 S.E.2d 315 (S.C. Ct. App. 2003) found an attorney liable in negligence for failing to advise the plaintiff's deceased mother about the opportunity for a disclaimer. The estate of the plaintiff's sister passed to the mother by intestacy, and the mother died less than eight months later. A disclaimer by the mother's estate would have saved almost \$200,000, for which the court found the attorney liable.

Under this analysis, Alice Shaw-Baker's estate should also recover for the wrongdoing by Defendant Kouten. (See also *Smith v. Haynsworth, Marlon, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (S.C. 07/01/1996) [case brought by executrix of estate]).

In a North Carolina case, *Jenkins v. Wheeler*, 316 S.E.2d 354 (N.C. Ct. App. 1984), *review denied*, 321 S.E.2d 136 (N.C. 1984), their court allowed the estate's heir to sue the attorney in tort where the heir alleged that the attorney had failed to list the wrongful death action as an asset of the estate, gave incorrect legal advice to the administrator and continued the representation of conflicting interests. Interestingly, the court also held that the heir's alleged contributory negligence was no bar to the cause of action of malpractice.

These are but *brief* examples of cases that were brought to recover for the harm done to the decedents' and their estates. Therefore, all of plaintiff's causes of action are viable, and Defendants motion must be denied.

**IV.
PLAINTIFF OBJECTS TO DEFENDANTS' UNSUBSTANTIATED AND FALSE
REPRESENTATION OF FACTS BOTH AT THE HEARING AND IN HIS BRIEFING FILED
AT THE NOVEMBER 28, 2012**

Defendants, by and through Defendant Kouten, made numerous allegations at the hearing, both with regard to the Summary Judgment motion and the Motion for Disqualification. These representations do not reflect the true facts and are incompetent evidence (i.e. not affidavits, request for judicial notice, or otherwise admissible evidence).

While the court had an opportunity to review Defendant Kouten's memorandum, and did not have time to review plaintiff's Return, objections, etc., she respectfully requests that the court disregard the improper evidence and argument that Defendant Kouten asserted at the hearing and in said papers and consider plaintiff's admissible evidence.

The "Facts" set forth on p. 1 through 4 of his motions and memorandum are not facts at all. They intend to mislead and manipulate the Court without any appropriate reference to the record without adequate ability for plaintiff to impeach their "unknown" evidence.

Plaintiff does not waive her objection to these statements, nor does she concede to the facts in any manner. The only admissible evidence presented in this case are the affidavits of Experts and supporting documents of Plaintiff.

Plaintiff respectfully requests that the Court sustain these objections, and disregard the references by defendant.²

² Plaintiff further objects to the presentation of the law in this case which is not accurate on many fronts, most blatantly in section E of the Memorandum re: Disqualification on the Sixth Amendment. Defendant contends that Sixth Amendment are grounds to deny the motion, however the United States Supreme Court decided in *Turner*

IV.
**A FINAL NOTE ON THE MOTIONS TO DISQUALIFY ATTORNEY KOUTEN:
THIS COURT HAS A DUTY TO REMOVE HIM³**

Alice Shaw-Baker was a citizen of South Carolina at her death. She was entitled to the same protections as other citizens. She was entitled to proper representation and protection prior to her death. This case demonstrates the real problems that arise when counsel fails to act for the best interest of their ward. Defendant Peter Kouten essentially admitted this at the hearing on November 28, 2012:

"Everybody who signed on as defendants under my representation – and don't get me wrong, Judge, looking at this kind of hindsight 20/20 thing, probably that was a mistake, but I didn't understand it.

All the clients have signed retainer agreements that said there is a possibility that there is, and I may just have to say I can't – I can't represent you any more, they have all signed off and said that's fine." (Transcript of proceedings, p. 45, ll. 11-16 and p. 46, ll. 16-20, emphasis added.)'

³ *v. Rogers*, 387 S. C. 142 (2011), "... the Sixth Amendment does not govern *civil* cases." This involved a South Carolina case. Defendant Kouten's contentions at the hearing, coupled with the argument that wrongful death and survival actions are the same, demonstrate a need for not only an accurate portrayal of the law, but of facts, for this Court's consideration.

Although this Court did not specifically ask for supplementary briefing on this matter, Plaintiff requests that the Court consider this brief argument. Defendants rehearsed the issue of disqualification in their memorandum for summary judgment, therefore plaintiff wanted an opportunity to address some of the incongruities in Defendants' position.

Defendant Kouten further admitted claimed that: "Judge, I was appointed as her guardian ad litem. I don't have any confidential information on Alice Shaw Baker because she had 24 hour care. Every time I met with her, I met with her with somebody else. Any time I got information from her, I provided it to the court." (Transcript, p. 43, ll. 14-20.)

This is clearly wrong. Confidential communications do not lose their confidential status merely because a third party is present who is reasonably necessary for the protection of the client's interests in the particular circumstances. (See *McCormick on Evidence*, § 91)

These admissions at the hearing also raise further questions into Defendant Kouten's representation of Ms. Shaw Baker. In a matter which was so important dealing with her potential loss of liberties, he had a *duty* to speak to her privately to ensure that she was able to communicate *freely*.

This is generally the accepted practice for individuals who may be vulnerable in the trust and estate community. Under the standard in *Sims v. Hall*, *supra*, the court held that the standard of care was established by the attorney's admission of wrongdoing. Plaintiff's contend Kouten's admissions demonstrate a breach of the standard of care. Although she reminds the Court that she has the Affidavit of Expert Mark W. Hardee filed with her opposition, as well as the affidavits of Elder Abuse Expert David Kessler, Candace Rickborn, and Lisa Fisher.

Here, Attorney Kouten has clearly stated that he didn't "understand" this matter, still he admits that a conflict exists which required his "current" clients to sign a waiver of conflict of interest. This smacks of rank disregard for Alice Shaw-Baker--the most important person in this case. Alice did not sign a waiver, nor can she. His admission of this non-waivable conflict requires Attorney Kouten to withdraw. Since he refuses, these are grounds for this Court to act.

As the court in *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996) made clear with regard to a guardian ad litem for a minor:

"We can perceive no greater conflict with one's duties to advocate the best interests of a child than to represent the parent of that child against the child herself in a future proceeding. The family court judge had ample authority, and, in fact, a duty to remove Lawyer from his representation of Father. The family court must ensure the integrity of the proceedings before it. There was no error." (Emphasis added.)

Alice Shaw Baker was Defendant Attorney Kouten's ward. Furthermore, he was her Court appointed attorney. He refuses to withdraw from a case, where there is an admitted conflict. He tries to distinguish the obligation owed to a minor, to that owed to Alice, an elderly disabled woman. She must be entitled to at least the same obligation owed to a child.

All of these actions harmed Alice Shaw Baker and her estate *during her life*.

Plaintiff respectfully represents that this Court has a duty to disqualify Defendant Kouten, both to maintain the integrity of *these* proceedings and to ensure that Alice Shaw-Baker and her estate are not subjected to this improper conflict of interest.

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WHEREFORE, Plaintiff respectfully prays that:

- 1) The Court deny Defendants' Motion for Summary Judgment in its entirety;
- 2) The Court deny Defendants' Motion to dismiss Action in its entirety.

RESPECTFULLY SUBMITTED:

JOHN HUGHES COOPER, P.C.

By: 

JOHN TOWNSEND COOPER, ESQUIRE

South Carolina Bar 76087

Federal Court ID 10176

JOHN HUGHES COOPER, ESQUIRE

South Carolina Bar 1387

Federal Court ID 298

1476 Ben Sawyer Blvd., Suite 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

And

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd., Suite 7

Mount Pleasant, SC 29464

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina.

December 7, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

Betty Fisher,
Plaintiff,

v.
Bessie Huckabee, etal,
Respondents.

SUPPLEMENTAL MEMORANDUM
SUPPORTING MOTION FOR
SUMMARY JUDGMENT
AND DISMISSAL OF ACTION

FILED
2012 DEC 20 AM 11:50
JULIE J. ARNSTRONG
CLERK OF COURT

COMES NOW the Respondents in the above action, seeking Motion for Summary Judgment and Motion to Dismiss. Peter A. Kouten, as Defendant in the present action, upon request of the Court, herein provides supplemental memorandum in Support of Defendant's Motion for Summary Judgment and Motion for Dismissal of this action.

QUESTIONS PRESENTED

- I. Does the Circuit Court have jurisdiction to address the Complaint brought by the Plaintiff under the Omnibus Adult Protection Act?
- II. Does a Plaintiff, who is not the Court-Appointed personal representative for an estate, have standing to bring a survival action under the Omnibus Adult Protection Act asserting her claim on behalf of the decedent as "real representative" of the estate?
- III. Additional arguments of the Plaintiff should be disregarded as they were not sought by the tryer of fact.

DISCUSSION

I

I. Does the Circuit Court have jurisdiction to address the Complaint brought by the Plaintiff under the Omnibus Adult Protection Act?

No, the Circuit Court lacks jurisdiction as the Omnibus Adult Protection Act explicitly and procedurally requires a report to be filed within two days of the allegations of abuse, neglect, or exploitation and any actions, petitions and hearings to follow the report must proceed in the family court.

The Omnibus Adult Protection Act (hereafter "The Act"), enacted in 1993, requires that any person with knowledge of abuse, neglect, or exploitation of a vulnerable adult shall report the incident within twenty-four hours of the alleged incident. South Carolina Code Ann. Section 43-35-25 The report must be made to Department of Social Services Adult Protective Services. These reporting requirements are mandatory. Id. If DSS has reasonable suspicion of

criminal conduct, the report and investigation must be forwarded to local law enforcement or the South Carolina Law Enforcement Division (SLED) within one working day of completing the review. South Carolina Code Ann. Section 43-35-40

Subsequent to the reporting and investigation stage, the Adult Protective Services Program may petition the *family court* (emphasis added) for an order to provide protective services. South Carolina Code Ann. Section 43-35-45 The family court has exclusive jurisdiction to seek protection of the alleged vulnerable adult under The Act. A hearing must be held within forty days of the petition being filed in the *family court* (emphasis added) and Adult Protective Services must conduct a comprehensive evaluation of the vulnerable adult prior to hearing. Id. Section 43-35-50 and 80 of The Act addresses the possibility of civil or criminal proceedings which may result after hearing.

Here, the decedent died in a hospital as the result of complications with cancer. Pro Hac Vice attorney for Plaintiff, Lisa Fisher, was the legal guardian of decedent at the time of her death. It is clear that any civil proceeding brought under this Act would have first required "a report made pursuant to this chapter" as it's basis. There was no contemporaneous report of abuse filed with DSS. There was no investigation and there was no court order after hearing. Since the Plaintiff has not proved that she has pursued the necessary actions precedent through DSS and no determination or finding by the family court that any defendant violated the Act, Plaintiff has not met the burden of establishing that this Court has jurisdiction to hear actions allegedly brought under the Act.

Further, Plaintiff discusses at length statutory interpretation and rules of construction in her Supplemental Memorandum. Here, the plain and ordinary meaning of the Omnibus Adult Protection Act is for the sole purpose of identifying vulnerable adults who are subject to abuse and, if found, immediately acting to remove said vulnerable adult from the abusive situation. The requirement is immediate, while the alleged vulnerable adult is allegedly being abused, not several years after her death. Plaintiff, under the strict interpretation of the Act, has not perfected her claim under the Act. Therefore, Plaintiff's claims under the Act should be Dismissed.

DISCUSSION

II.

II. Does a Plaintiff, who is not the Court-Appointed personal representative for an estate, have standing to bring a survival action under the Omnibus Adult Protection Act asserting her claim on behalf of the decedent as "real representative" of the estate?

No, Plaintiff does not have standing. The Law of Real Representative is an enlargement of the power of the Court-Appointed personal representative and grants the personal representative of an estate, who, prior to 1904, could satisfy estate claims with personal assets only. The Law of Real Representative and Land Transfer Acts gave the personal representative power to marshal the real estate of the decedent to

pay estate claims and has no nexus to the Omnibus Adult Protection Act or any other action brought on behalf of the decedent.

Real Representative

In Black's Law Dictionary published 1910, a real representative is defined as follows:

He who represents or stands in the place of another with respect to his real property is so termed, in contradistinction, to him who stands in place of another, with regard to his personal property, and who is termed the personal representative.

"An heir is a representative of his ancestor and the executor is the representative of the testator, the heir standing in the place of his deceased ancestor with respect to his realty, the executor standing in the place of his deceased testator with respect to his personality..."

Black's Law Dictionary, 2nd Edition, 1910 pg 1020-1021

Further definition of a real representative can be found in the publication, The Real Representative Law, published in 1898. This publication is informative in its discussion of the prior difference between authority over both personal property of decedent and real property of decedent.

The Land Transfer Act of 1875, originally enacted in England and Wales, and amended with the Land Transfer Act of 1897, introduced an important amendment to the general law which separated the real and personal property by making real estate vest in the personal representative. Prior to this act and its predecessors, creditors "under seal" as mortgagors may claim an interest in the decedent's real property so encumbered. These creditors faced difficulty seeking repayment as the real property vested in the heirs at death. Further, those creditors who were not considered under seal, those not having a security interest in the real property, did not have legal recourse to seek payment of their claim from the decedent's real property. The Real Representative Law, 1897, being part I. of the Land Transfer Act, 1897, and a discussion on administration thereunder (1898). W. Clowes and Sons, London 1898. (See publication online at <http://archive.org/stream/realrepresentati00tyss#page/n5/mode/2up>)

The Land Transfer Acts ceased the automatic transfer of real property to the testate devisee or intestate heir at law and allowed the personal representative the authority to access the real property for the payment of all proper debts of the estate. As the personal representative under current code has authority over all property of the decedent, real and personal, the personal

representation and real representative, as appears in the survival statute, are one in the same and, if there be a modern day distinction between the two, it is a distinction without a difference.

Additionally, The South Carolina Probate Code specifically designates and places upon the personal representative of a decedent's estate standing to sue on behalf of the decedent. South Carolina Probate Code Ann. Section 62-3-703 Further, a personal representative is granted the authority to prosecute estate claims. South Carolina Probate Code Section 62-3-715(20) The South Carolina Probate Code grants standing to sue on behalf of a decedent to the court-appointed personal representative. These statutes provide certainty to anyone who has dealings with the estate that authority is centralized, without question, in the appointed representative.

Plaintiff, in her Supplemental Memorandum, discusses the survival statute and concludes that the legislature "specifically gave authority to the real representative to bring this action." The Plaintiff does not provide reference as to the definition of real representative. Here, the Defendant has provided ample review of the law of real representatives with historical background. Defendant has provided a definition of real representative. It would appear that reference to the real representative in the survival statute of the South Carolina Civil Code Section 2859 of 1902 had the original intent to address "causes of action for injuries and trespass to real estate"¹ by the real representative. With the current probate code, the personal representative controls all decedent's property, real and personal. Defendant has provided statutory reference and case law to those persons with authority to sue and each includes the personal representative or co-personal representatives. Finally, if there be any spark of life still vested in what is termed "real representative" it would not extend beyond questions or issues with real property. The Plaintiff's actions are not grounded in real property and thus, are not actions which were intended to be authorized by a real representative, if such distinction today exists. Based on the foregoing, Plaintiff's actions should be Dismissed for lack of standing.

¹ South Carolina Survival Statute: SOUTH CAROLINA CODE SECTION 15-5-90. Survival of right of action. Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding. HISTORY: 1962 Code Section 10-209; 1952 Code Section 10-209; 1942 Code Section 419; 1932 Code Section 419; Civ. P. '22 Section 375; Civ. C. '12 Section 3963; Civ. C. '02 Section 2859; R.S. 2323; 1892 (21) 18; 1905 (24) 945.

12-1332

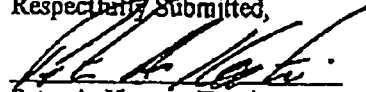
DISCUSSION

III

Defendant objects to Plaintiff's taking license to supplement her memorandum with additional arguments which are unsolicited and act to complicate the issues in her Complaint. Plaintiff has taken the transcript out of context and assumes that the statement of misunderstanding has a meaning other than the intended meaning. What the Defendant did not understand is that a conservator, Lisa Fisher, appointed by the probate court and under the jurisdiction of the probate court would provide to the estate division an original Last Will of the decedent after indicating its existence to the commitment division and then contesting the Last Will. Plaintiff does not have standing in this action and therefore, her actions should be Dismissed.

WHEREFORE, Defendant respectfully requests that this Honorable Court Grant defendant's Motion for Summary Judgment and Dismiss all counts of the Plaintiff's Complaint.

Respectfully Submitted,



Peter A. Kouten, Esquire
P.O. Box 340
Johns Island, S.C. 29457
Office: (843) 670-3919
Fax: (843) 559-3162
pkouten@gmail.com

Charleston, South Carolina

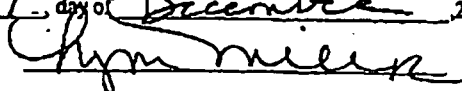
December 17, 2012.

Counsel served: John T. Cooper, Esquire
John H. Cooper, Esquire
Lisa Fisher, Esquire (c/o John H. Cooper, PC)
1476 Ben Sawyer Blvd.
Mt. Pleasant, SC 29464

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading to which this certificate is affixed was served upon the Party(s) to this action by depositing a copy of the same, enclosed in a first class, postpaid envelope properly addressed to the attorney(s) of record for such other in the US Mail, on this,

17 day of December, 2012.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2012-CP-10-1332
) (And Related Case, 2009-CP-10-3010)

BETTY FISHER, as Real Representative
for Alice Shaw-Baker,

Plaintiff,

v.

BESSIE HUCKABEE et al

Defendants,

) MOTION BY PLAINTIFF BETTY
) FISHER TO ALTER, AMEND, RECONSIDER,
) AND VACATE ORDER OF MAY 8, 2013;
) MEMORANDUM; AFFIDAVIT OF JOHN
) HUGHES COOPER

) JOINDER BY PETITIONERS BETTY
) FISHER AND LISA FISHER
) TO THIS MOTION AND OBJECTION TO
) "ENDING" OF WILL CONTEST ACTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Betty Fisher, Real Representative for Alice Shaw-Baker, by and through her undersigned counsel ("Plaintiff"), will move this Honorable Court pursuant to South Carolina Rules of Civil Procedure §§ 59 and 60(b) for an Order Amending, Reconsidering, Altering, and Vacating this court's order of May 8, 2013 (and received by counsel on May 15, 2013) which issued its:

"Statement of Judgment by the Court: Plaintiff's Motion
for Summary Judgment is Granted." (Emphasis added)

At the same, the court also included the following information:

Betty Fisher and Lisa Fisher are petitioners ("Petitioners") in the underlying will contest/removal action. (*Baker v. Huckabee*, 2009-CP-10-3010). Said action will be referred herein as "Will Contest". Petitioners join in this motion, in the event that the court meant to dismiss the "Will Contest", and object to the dismissal of the Will contest action. Any and all reference to Plaintiff, is joined by petitioners.

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"Case is related to Baker v. Huckabee (2009-CP-10-3010)
and this case also ended."

The order appears to exceed this court's discretion in granting relief not requested, and dismissing the Will Contest action which a case that was not before it for purposes of summary judgment or dismissal. Plaintiff clearly believes that this is error, both based on Due Process under the Federal and State Constitutions, as well as substantive grounds (i.e. no legal grounds exist to dismiss the Will contest action, as set forth herein.²

Plaintiff herein did not file a Motion for Summary Judgment, although she did file a Motion for disqualification which the court has not yet ruled on, so granting Summary Judgment relief would be improper. Plaintiff respectfully requests that the court grant this motion in its entirety.

The grounds for this motion are that:

1. This court granted plaintiff summary judgment, however plaintiff did not bring said motion. Further said order is against the law in that it fails to set forth factors and legal analysis for granting summary judgment and/or involuntary dismissal.
2. This court wrongly ruled by its Dismissal of the Omnibus/Breach of Fiduciary Duty/Legal Malpractice action, because plaintiff presented expert testimony and other testimony showing there are genuine issues for trial on these causes of actions, and a novel issue regarding the concept of a "real representative" is present.
3. This court wrongly "ended the Will Contest matter which is ready for trial, and requires only timely compliance with the consent scheduling order.

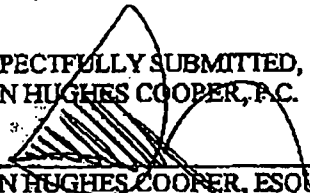
^{2/} It is well settled that "Although a trial judge enjoys broad discretion in [his decision to dismiss a case, "[i]t is of course contemplated that the . . . rule will be reasonably applied so as accomplish its purpose of expediting the orderly disposition of litigation on the merits." (See *Small v. Mungo*, 254 S.C. at 442-43, 175 S.E.2d at 804. This Court views the dismissal of a case with prejudice as an especially harsh sanction. See *id.* at 443-44, 175 S.E.2d at 804 (finding the court's dismissal of an action with prejudice was unjustified and modifying the order to a dismissal without prejudice); see also *McComas v. Ross*, 368 S.C. 59, 61, 626 S.E.2d 902, 904 (Ct. App. 2006) (trial judge alters dismissal with prejudice to dismissal without prejudice to lessen the sanction).)

If the court did indeed dismiss the Will contest action, then it did so without proper notice to petitioners/plaintiffs who immediately seek relief from dismissal based on mistake/surprise/void judgment under Rule 60(b).

4. This court's "ending" of the Will contest action was prejudicial to plaintiff and is adverse to the decedent's wishes to revoke said Will and leave her estate to animal charities.
5. No grounds exist to relate the cases which include different parties and different relief and seeks vindication of Alice Shaw Baker's rights.
6. Dismissal of the Will Contest without Notice and an Opportunity to be Heard is a Violation of Due Process and Equal Protection.
7. The Court failed to Rule on Plaintiff's objections to Defendant's Motion, improper reliance on argument, and if waiver occurred due to defendants/respondents failure to set forth the parties names in bringing said motions and lack of reference to causes of actions.

This Motion is based on the South Carolina Rules of Civil Procedure,³ and applicable case and statutory law.

RESPECTFULLY SUBMITTED,
JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and
LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

May 27, 2013

³ Herein, plaintiff references the South Carolina Rules of Civil Procedure as "Rule" or "Rules".

12-CP-10-1332

MEMORANDUM

I.

INTRODUCTION

Plaintiff brings this motion pursuant to Rules 59 and 60 to ensure that the desires of Alice Shaw Baker, a citizen of South Carolina, at the time of her death are fulfilled. Justice demands that the court consider the serious implications of granting this motion, and preventing the recovery of her assets and recovery for the wrong she suffered in her last days. This motion is the product of careful consideration of all the facts of this difficult and complex case, which have been reduced to two sentences by this court in dismissing not only the Omnibus action, but a Will Contest case which has been properly prosecuted since its filing. This is an injustice which mandates reversal, and provides the parties with proper adjudication of both cases. However, the cases are not the same, do not involve the same parties, and do not involve the issues as set forth below, in prior pleadings, and set forth in the files of the respective cases.

A. Statement of Facts

1. Alice Shaw-Baker died on February 25, 2009 of pneumonia. Her family from California, petitioners, came to South Carolina to help her after a conservatorship petition was filed without notice to her family.

2. The Decedent's niece, Betty Fisher, and her great-niece and former Conservator and Guardian, Lisa Fisher, filed the Will Contest action against Defendant Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd in the Charleston County Probate Court on April 27, 2009 and removed it to the Charleston County Court of Common Pleas on May 13, 2009. The case is entitled *In the Matter of Alice Shaw Baker Estate, Betty Fisher et al. v. Bessie Huckabee et al.*, case no. 2009-CP-

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CLERK OF COURT

10-3010. ("Will contest").⁴ This action contests the decedent's May 21, 2001 will and certain change-of-beneficiary designations for the decedent's deferred compensation fund, pension, and life insurance.

3. Said action has not yet gone to trial due to unmerited motions by Defendants, ex-parte communications by Defendants' counsel with the court, Defendant Huckabee's concealment of estate assets, refusal to obtain bond, and numerous delays in hearings on motions, and appellate issues. Nevertheless, plaintiff has properly prosecuted the Will contest matter, engaged in formal and informal discovery, and retention of experts. Due to these delays, the statute of limitations was to run on any possible cause of action for Alice Shaw Baker's claim for abuse and malpractice she suffered during her life.

4. Therefore, solely to protect these rights, On February 24, 2012, Plaintiff as Real Representative for Alice Shaw Baker filed this action. The Complaint has four causes of action: 1) Violation of Omnibus Adult Protection Act; 2) Breach of Fiduciary Duty against all defendants; 3) Legal Malpractice as to Defendant Kouten; 4) Attorney Fees and Costs.

5. Also, plaintiff filed her Motion for Disqualification of Defendant Peter Kouten, because he represented both Alice Shaw Baker and Defendants Huckabee, Slade, and Byrd *while Alice was alive*—despite the fact that these defendants had and have adverse interests to Alice Shaw Baker. This issue was expressly preserved by the Appellate Court in its earlier opinion. The issue is significant and demands resolution prior to trial, to avoid further ethical quandaries in having Defendant Kouten

⁴ The Complaint in this matter asserts causes of action for Constructive Trust, Declaratory Judgment Regarding Revocation of the contested will, Undue Influence, Fraud, Declaratory Judgment Regarding Improper Execution of the contested will, Unjust Enrichment, Promissory Estoppel, a Petition for Removal of Huckabee as Personal Representative, a Petition for Appointment of Betty Fisher as Personal Representative, and Attorneys' Fees and Costs.

represent adverse interests to Alice Shaw Baker, his former client, and to avoid the appearance of impropriety and actual impropriety before the jury. (This matter was not decided by this court).

6. On July 11, 2012, Defendant filed its Motion for Summary Judgment and Dismissal of Action in the Omnibus Action/Breach of Fiduciary Action/Legal Malpractice action ("Omnibus"), case no. 2012-CP-10-1332. The motion was ambiguous as to who brought the motion, and in what capacity. Plaintiff timely filed her return and objections.

7. Prior to hearing on these motions, The parties entered into a Consent Scheduling Order on September 25, 2012. Said order stated that all remaining discovery in the Will contest action shall be completed within 120 days after disposition of pending motions, and case subject to trial 30 days thereafter. (Attached hereto is a true and correct copy of said consent scheduling order marked as Exhibit A)

8. The motions were not set for hearing until November 28, 2012. The court ordered supplementary briefing by the parties which was filed on December 7, 2012. Although there was a significant delay in setting the hearing dates, this was consistent with prior motions filed in this case. The court did not issue its order until May 8, 2013 which read as follows on Form 4:

"Statement of Judgment by the Court: Plaintiff's Motion for Summary Judgment is Granted." (Emphasis added)

At the same, the court also included the following information:

"Case is related to Baker v. Huckabee (2009-CP-10-3010) and this case also ended."

9. Said order was not received by counsel until May 15, 2013.

II.

THIS MOTION IS GOVERNED BY RULE 59 AND RULE 60(b)

South Carolina Rules of Civil Procedure, Rule 59 (e) provides that: "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

Further, South Carolina Rules of Civil Procedure, Rule 60(b) provides in pertinent part that: "On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void..."

The trial court erred in its issuance of the form order of May 8, 2013 (and received by counsel on May 15, 2013) and plaintiff/petitioners seek relief as stated herein.

III.

PLAINTIFF'S MOTION IS TIMELY FILED PURSUANT TO RULE 6

Pursuant to Rule 6(a), this motion is timely. Rule 6(a) provides in pertinent part that if "The last day of the period...is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such Holiday."

Here, Plaintiff's counsel received the Order by mail on May 15, 2013, so the motion under Rule 59 (b) was to be filed on May 25, 2013 which was a Saturday and Monday was a Federal Holiday, Memorial day. Therefore, filing on Tuesday, May 28, 2013, is a timely motion.

IV.

THE COURT MUST GRANT PLAINTIFF'S MOTION, BECAUSE THE "ORDER" FAILS TO INCLUDE ANY FACTS OR RATIONALE TO PROVIDE NOTICE TO PLAINTIFF AND AS SET FORTH HEREIN IS IN ERROR.

The Court's order of May 8, 2013 grant's plaintiff's motion for summary judgment, however she never filed a motion for summary judgment. At the same time, the court apparently "ending" the Will contest matter, not even using the term "dismissed". All creating confusion and interfering with the proper prosecution of both cases.

These matters are proper for this Rule 59 and Rule 60 motion. It is well settled that a trial court's order on summary judgment must set out facts and accompanying legal analysis. Also, the court must set forth in its order "those facts which the trial court finds relevant, determinative of the issues and undisputed. Moreover, the order should provide notice to all parties of the court's rationale. (See *Bowen v. Lee Process Systems Co.*, 342 S.C. 232; see also *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 271 [court vacated and remanded for a written order where court used form order to grant summary judgment].)

The one sentence order effectively prevents plaintiff from asserting the rights on behalf of Alice Shaw Baker, who was victimized during her life by Defendants/Respondents and is adverse to the policy of South Carolina of protecting the elderly.

With regard to the Will contest matter, the trial court's purported order "ending" it is even more unsettling, and plaintiff asserts an abuse of discretion. There are no facts which suggest that there was any "indifference to defendant" (See *McCamas v. Ross*, 368 S.C. 59 [dismissal too harsh penalty for plaintiff's failure to attend trial]), and there are no facts which justify the dismissal of this important Will contest.

V.

**CONSENT SCHEDULING ORDER PRECLUDES DISMISSAL
OF UNDERLYING WILL CONTEST CASE**

The underlying Will contest is subject to a Consent Scheduling Order pursuant to Rule 40(e), which provided for trial. (Attached hereto is a true and correct copy of said scheduling order marked as Exhibit A and emails to Don Michel, Court Management Supervisor marked as Exhibit B, none showing any objection or warning to plaintiff that the case was not appropriate for a scheduling order.)

Pursuant to rule 40(e)(2):

"[T]he clerk shall promptly set the Request for a Scheduling order for a hearing before the Chief Judge for Administrative purposes...at which time the Chief Judge shall review the matter and, in its discretion, set a date on which the case is to be transferred to the Jury Trial Roster, and may set a date before which the case may not be called for trial or a date certain for trial." (Emphasis added)

Plaintiff complied with this rule, and Defendant/respondents consented to said order. (See Rule 40(j) when a party stipulates to striking from the docket, said consent tolls statute of limitations; see also *Erickson v. Jones Street Publishers, LLC*, 629 S.E.2d 653, 368 S.C. 444 (S.C. 04/10/2006)[waiver by acquiescence to bifurcation of issues]) Here, defendants/respondents can not now argue any prejudice, not by mere acquiescence to the court procedure, but by their actual consent to the procedure. Good cause existed to have the court hear plaintiff's important motions in this case and in the underlying Will contest.

Plaintiff contends that due to delays in setting the hearings on these (and previous) motions, the scheduling order was the most reasonable means of setting the trial date.

There had been numerous delays in setting other matters for hearing on motions, so a consent scheduling order was the only method to ensure an opportunity to be heard by the parties. Had the parties set a trial date to a date certain, then the court would not have an opportunity to decide plaintiff's important motion for disqualification of Defendant Kouten.

Under Rule 60, the failure of the court to warn plaintiff of potential dismissal and provide her with an opportunity to be heard amounts to surprise and/or accident. The Will contest case is ready for trial, has gone through most formal and informal discovery, and plaintiff has retained experts, however the issue of Defendant Kouten's misconduct and non-waivable conflict permeate this case.⁵

Counsel for Defendants/Respondents own conduct demonstrated that he owed a fiduciary duty and ethical obligation not to act in a manner adverse to Alice Shaw Baker. He has continued to act in adverse manner in this case, and this Court's failure to rule on motions related to his conduct prejudices Alice Shaw Baker and her estate. The appearance of impropriety, and actual impropriety, that will result with Defendant Kouten's continued representation of Defendants should be resolved through proper orders of this Court.

The scheduling order is necessary to ensure that all witnesses are available, or whether depositions must be used so that is why the scheduling order was most appropriate. Defendant/Respondents waived any objection to timing, by signed the consent order. This Court's May 8, 2013 order interferes with the prior determination of the presiding Judge, Judge Jefferson, and mandates reversal. (*Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (S.C. 11/02/1978) [one judge shall not modify another judge's orders]).

VI.

PLAINTIFF ASSERTS THAT THE TRIAL COURT ERRED IN GRANTING OF SUMMARY JUDGMENT IN THE OMNIBUS CASE, AND "ENDING" OF WILL CONTEST CASE WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

With regard to the Omnibus Action, Plaintiff contends that it was error for the Court to consider Defendant's motion as a summary judgment motion. Plaintiff objected to Defendants and/or Respondents use of "argument" as evidence (*Request for Judicial notice*, rule 201, *Return*, p. 6 and in *Plaintiff's*

⁵ Under laws governing a guardian ad litem, Attorney Kouten should not have, in future proceedings, represented any parties with interests opposed to the best interests of his former ward. (*Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), emphasis added.) Therefore, Peter Kouten's actions (in both matters) was tantamount to obstruction of justice by his representation of defendants in this matter. Defendants are aware that the Appellate court in the underlying appeal that was prosecuted by plaintiff specifically reserved plaintiff's right to seek disqualification of Defendant Kouten by any other court that hears this matter. Again, Defendants can not claim any prejudice.

supplemental brief, p. 8). The moving motion was made, not on affidavits, but purportedly on the Defendant's verification of the motion.

Plaintiff objected on these grounds stating that S.C. Rules of Civil Procedure, Rule 56(e) have a personal knowledge requirement, and that they can not verify what is merely argument by counsel, nor does it meet the requirements under Rule 7(b)(1), in that it fails to state with "particularity the grounds" for relief. Moreover, the allegations do not accurately reflect the facts and events leading to this case.

Further, Defendant failed to make a "showing" that there was no evidence in support of Plaintiff's case. (See *Richardson. The State Records Co. Inc.*, 330 S.C. 562 (1998). So plaintiff was not fairly apprised that the Court's consideration of information outside the pleadings or even that the defendants/respondents were addressing the issues of the case. (See *Higgins v. MUSC*, 326 S.C. 592, 486 S.E.2d 269 (Cl. App. 1997)(holding that the plaintiffs had not been "fairly apprised" that the trial court would consider material outside the pleadings in support of the defendant's 12(b)(6) motion).

Despite this lack of any showing, plaintiff submitted expert declarations and exhibits in opposition to the Omnibus action. This evidence raised triable issues of fact which support plaintiff's continuation of the survival action on behalf of Alice Shaw Baker.

With regard to the Will Contest Action, Plaintiff was not on notice that the Court would consider dismissal of the action. Defendants had stipulated to the consent scheduling order as set forth above, and the presiding judge signed it. But there was no notice that the Court could dismiss this case, so the order dismissing the action is in violation of Due Process and Equal Protection.

VII.

THE COURT'S TWO-SENTENCE ORDER FAILS TO ADDRESS THE ISSUES IN THIS CASE, SO PLAINTIFF REPEATS THE ISSUES TO PREVENT ANY WAIVER EFFECTING ALICE SHAW BAKER'S SURVIVAL ACTION, AND NOW THE UNDERLYING WILL CONTEST

Defendants have the burden of demonstrating "the absences of a genuine issue of material fact" in a Motion for Summary Judgment. (See *Richardson v. The State Record Co., Inc.* 330 S. C. 562, 499 S.E. 2d 822, 824-825)

In ruling on a motion for summary judgment, the evidence and inferences can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. (See *Johnson v. Paraplane Corp.* 319 S.C. 247, 251, 460 S.E.2d 398, 400 (1995).)

These principles mandate that the Court grant this motion, reverse summary judgment in the Omnibus Act matter, and allow the Will Contest to be prosecuted. However, in preserving all rights in the in this Rule 59 and Rule 60 motion, plaintiff again briefly raises the important, material issues:

A. Plaintiff has Standing to Pursue the Omnibus Action on Behalf of Alice Shaw Bake

As Set forth in Plaintiff's previously filed *Return, Objection and Opposition* and her *Supplemental Memorandum*, South Carolina Code Ann. § 15-5-90 (1976) provides that:

"[c]auses of action for and in respect to... any and all injuries to the person or to personal property shall survive both to and against the personal or real representative... of a deceased person... any law or rule to the contrary notwithstanding." (Emphasis added)

The court in *Duke v. Postal Telegraph Cable Co.*, 71 S.C. 95, 50 S.E. 675 (SC 1905), explained that "heirs at law are the real representatives." (Emphasis added)

This is not an area of law that has been developed, and can be construed as a "novel" theory, which is also generally precluded under South Carolina law. (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (Cl. App. 2003) [error to grant summary judgment without an opportunity for full and fair discovery])

Finally, plaintiff contends that Alice Shaw Baker intended for her property to go to animal charities. However if the Court determines that plaintiff is an heir at law, then she has a claim to an interest which can not be lost. (See *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 222 (S.C. App. 2004)).⁶

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⁶ This case also stands for the proposition that cases involve probate contests can be highly litigious, and take considerable time. Plaintiff has always acted appropriate to move this case along, therefore dismissal of the Will Contest is improper. Failure to allow discovery is also improper in the Omnibus/Breach of Fiduciary Duty/Legal Malpractice.

B. Defendants' did not present Evidence, only Argument which can not be used to support the Grant of Summary Judgment.

Furthermore, Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment. (See *Trivelas v. S.C. Dept. of Transportation*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (2001).)

Defendants set forth false and erroneous facts in both the Motion and the Supplemental Memorandum, which plaintiff submitted objections. Because plaintiff does not know the rationale of the Court for the grant of this motion, plaintiff repeats these objections and argument.

C. South Carolina law regarding Protection of the Elderly (Omnibus Act) supports an Expansive Role of Family in Prosecuting Cases, when as here, Defendants abandon, neglect, and exploit the Elderly supporting Plaintiff's Establishment of Triable Issues of Fact Precluding the Grant of Summary Judgment

Any relief obtained by plaintiff's Omnibus/Legal Malpractice action/Breach of Fiduciary Duty would be to recover for the damage incurred personally for Ms. Shaw Baker—thus, it is a survival action for her benefit. It is well settled that the test of a survival action in South Carolina is whether the *decedent* suffered conscious pain and suffering. (See *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 139, 28 S.E.2d 683, 685 (1944) (emphasis added).)

The harm suffered by the Decedent, Alice Shaw Baker was Real and Meets the Standards under the Omnibus Act, Breach of Fiduciary Duty, and for the Legal Malpractice Cause of Action: Plaintiff submitted Affidavits from two expert witnesses, and outlining affidavits of other witnesses concerning the improper treatment of Ms. Shaw Baker.

The court in *Williams v. Watkins*, 665 S.E.2d 243, 379 S.C. 530 (S.C.App. 07/23/2008) set forth the purpose of the "Omnibus act":

"In 1993, South Carolina's General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. 1993 Act No. 110, § 1, codified as S.C. Code Ann. §§ 43-35-5 to -595 (Supp. 2007)." (Emphasis added)

The rationale in *Williams*, coupled with the principles enunciated in *Duke* emphasize the need for family members to stand up for their relatives, when a personal representative is unavailable.

In a federal decision, *Williams Garrett v. Murphy*, 106 F.Supp.2d 834 (2000), the court held that the legislature intended to create a Private cause of action under South Carolina Omnibus Adult Protection Act for the act of abusing, neglecting, or exploiting vulnerable adults. (S.C.Code 1976, §§ 43-35-5(4, 5), 43-35-80.)

Additionally, The court in *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) found that "[a] fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." This applies to all defendants, and as evidenced in the affidavits, a triable issue of fact exists as to the defendants' breach of fiduciary duty.

Alice Shaw Baker meets the definition of a vulnerable adult, the conduct described meets the definition of abuse, exploitation and constitutes isolation and neglect. The affidavits raise triable issues of fact. So as stated, plaintiff contends that the Court erred by granting the Motion for Summary Judgment (and the "ending" of the Will Contest matter).

D. Triable Issues of Fact Exist as to Defendant Kouten's Wrongdoing and Legal Malpractice

As to Defendant Kouten alone, the courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship. (*Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003); *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991); *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987); *Royal Crown Bottling Co. v. Chandler*, 226 S.C. 94, 83 S.E.2d 745 (1954); *Wise v. Hardin*, 5 S.C. 325 (1874); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000).)

"The relationship of an attorney with his or her client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith." (See *Weatherford*, *supra*, 340 S.C. 572)

Attorney Kouten, as guardian ad litem, had a duty of advocating the best interests of his ward, Alice Shaw Baker. Under laws governing a guardian ad litem, he should not have, in future proceedings, represented any parties with interests opposed

to the best interests of his former ward. (*Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), emphasis added.)

As more fully developed in plaintiff's opposition, Defendant Kouten's actions harmed Alice Shaw Baker, and under South Carolina Law, a survival action is proper. Plaintiff met her burden by filing the affidavits. The unusual circumstance of not having an acting personal representative does not prevent Plaintiff from protecting the cause of action so that the statute of limitations does not run.⁷

E. The Claims in the Omnibus Action and the Will Contest Action are not the Same, and as Such Relating the Cases is Improper.

A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim. (See *Capital City Insurance Co. v. BP Staff, Inc.*, 382 S.C. 92 (2009) [when cases are fundamentally and structurally different, court must deny motion.])

The Will contest action is not the same, as the survival action asserted solely on behalf of Alice Shaw Baker.

F. The Court Failed to Rule on Plaintiff's Objections to Defendant's Motion which Failed to Identify Moving Defendants.

Plaintiff contends that the moving documents are so ambiguous that the Court must rule on plaintiff's objections. No reference is made to Defendant Kouten's representation of Respondents in the Motion and Information Form. (Attached hereto is a true and correct copy of said *Motion and Order Information with Attached Motion Marked*

⁷ Since Defendant Huckabee is subject to removal, and her removal is mandated in part due to her failure to give notice to family, her failure to obtain a bond as ordered by this Court on June 9, 2009, her concealment of estate assets in the inventory filed wherein she excluded the receipt of IRA funds belonging to Alice Shaw Baker in excess of \$16,000.00 (Attached hereto is a true and correct copy of the inventory of Defendant Huckabee marked as Exhibit C), and all the other grounds that the plaintiff asserts in her complaint.

as Exhibit D.) This case is a "Circuit Court" case referencing "Defendants", not Respondents.

The motion is ambiguous at best, Defendant Peter Kouten's motion does not address who is bringing the action in his moving papers. The first page of the motion references Respondents, and throughout the moving papers, there is no mention to Defendant Kouten and no reference to the causes of actions. It is replete with inaccuracies, and false statements which were not supported by affidavit. The motion is verified—which is contrary to the standard for rule 56 motions. It is not verified by Defendant Kouten, so it would appear that "Respondents" Passailague, Slade, and Byrd brought the motion, but not in their capacity as "Defendants".

Moreover, since Defendant Kouten did not raise the issue of the Legal Malpractice or Breach of Fiduciary Duty Causes of Action in the Complaint, and nothing in the motion even speaks of the allegations, it again leads to the conclusion that Defendant waived the standing issue as to his claim.

In Defendant's *Supplemental Memorandum*, Exhibit E, on p. 1 and in the Discussion on p. 5,⁸ the "Defendant" is used singularly throughout the entire motion—no reference to Passailague, Slade and Byrd. Since plaintiffs' complaint has distinct allegations against the various defendants, plaintiff is at the very least entitled to notice of the moving parties. The prayer in the *Supplemental Memorandum* (Ex. E) is also referenced in the singular.

Plaintiff makes it clear that this is not merely "form over substance" (*See Gordon v. Busbee*, 623 S.E.2d 857, 367 S.C. 116 (S.C.App. 11/21/2005)[trial court erred when it held statute must be satisfied with mandatory probate form]), instead it is a necessary issue to determine whether any of the named defendants waived the issue of standing.

⁸ Defendant Kouten did not number his pages, so for convenience, plaintiff is filing said Defendant's supplemental memorandum with numbering for reference as Exhibit E.

(See *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (S.C. 05/12/1997); see also *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].) (See Exhibit E.)

G. The Circuit Court has Concurrent Jurisdiction to hear Plaintiff's Case Against Defendants.

Section 62-1-302 (b) provides:

"The court's jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate." (Emphasis added)

This "concurrent" jurisdiction is bolstered by the plain language of Section 62-3-804(2) of the South Carolina Code which allows a tort claimant to sue the personal representative of an estate in any court.

Therefore, under the accepted principles governing interpretation of statutes in South Carolina, Plaintiff, on behalf of Alice Shaw-Baker, is entitled to pursue this action under concurrent jurisdiction, or in any court under § 62-3-804(2) against all Defendants.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion pursuant to Rule 59 and Rule 60, and reverse summary judgment in the Omnibus Action and reverse the dismissal of the Will Contest.

//

//

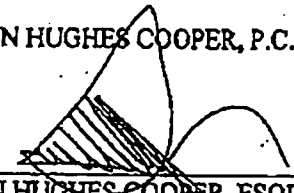
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//

Further, plaintiff requests that the Court allow the parties to comply with the Consent Scheduling order in the underlying Will Contest matter, and reverse the order "ending" the action.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

May 27, 2013

12-CP-10-1332

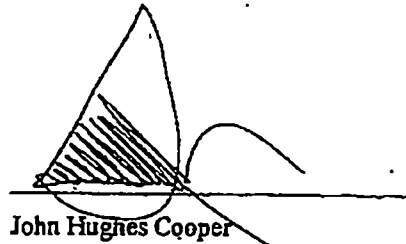
AFFIDAVIT OF JOHN HUGHES COOPER

PERSONALLY APPEARED, JOHN HUGHES COOPER, who, first being duly sworn,
deposes and says:

1. My name is John Hughes Cooper.
2. I am a citizen of the United States, over 18 years of age, and of sound mind. I am local counsel for Plaintiff Betty Fisher and in her capacity as Petitioner in the underlying Will Contest.
3. The sources of my information and the grounds for my beliefs herein are my personal knowledge and the documents in my possession.
4. As counsel for plaintiff, I can affirm that plaintiff has properly prosecuted the Will contest matter. We have engaged in formal and informal discovery, and retained experts. Due to delays in hearing of the motions and the need to address critical questions about the bond and the ex -parte communication of Defendant Kouten, the statute of limitations was to run on any possible cause of action for Alice Shaw Baker's claim for abuse and malpractice she suffered during her life. The Omnibus action was filed to protect this cause of action for Alice Shaw Baker and her heirs.
5. Attached hereto is a true and correct copy of said scheduling order marked as Exhibit A and emails to Don Michel, Court Management Supervisor marked as Exhibit B, none showing any objection or warning to plaintiff that the case was not appropriate for a scheduling order.
6. Attached hereto is a true and correct copy of the inventory of Defendant Huckabee marked as Exhibit C.
7. Despite court order, Defendant Huckabee failed to give notice in her initial petition for appointment, failed to obtain a bond as ordered by this court on June 9, 2009, and I am informed and believe that she has concealed estate assets in the inventory filed wherein she excluded the receipt of IRA funds belonging to Alice Shaw Baker in excess of \$16,000.00.
8. Attached hereto is a true and correct copy of said *Motion and Order Information with Attached Motion* Marked as Exhibit D.

9. Attached hereto is a true and correct copy of the *Defendant's supplemental memorandum* with numbering for reference as Exhibit E. The numbering in the supplement is provided by this office for the court's convenience.
10. Finally, the Appellate court in the underlying appeal that was prosecuted by plaintiff specifically reserved plaintiff's right to have any other court hear the disqualification motion, which defendants are aware of.

Further affiant sayeth naught.



John Hughes Cooper

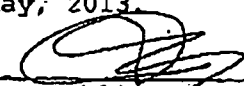
Mount Pleasant, South Carolina

May 28, 2013

[See Attached Notarization]



Sworn to and Subscribed
Before Me this 28th Day
Of May, 2013.


Notary Public for South
Carolina; My Commission
Expires: 3/4/2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION 2009-CP-10-3010

Betty Fisher et al.

Plaintiffs,

vs.

Bessie Huckabee et al.

Defendants,

In the Matter of
Alice Shaw-Baker.

CONSENT SCHEDULING ORDER

FILED
2012 SEP 25 AM 9:32
JULIE J. ARMSTRONG
CLERK OF COURT

UPON MOTION OF PLAINTIFFS, with consent of Defendants, and after due consideration, it is

HEREBY ORDERED that all remaining discovery in this action shall be completed within 120 days after the Court's disposition of pending motions, and it is

FURTHER ORDERED that this case shall be subject to trial 30 days after the end of discovery.

IT IS SO ORDERED.

S. D. S. DeLoach
JUDGE, NINTH JUDICIAL CIRCUIT

9/18, 2012

Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, CP, GA & PC
[Signature]
CLERK OF COURT

EXHIBIT

A

Consent Scheduling Order
2009-CP-10-3010

WE SO MOVE

JOHN HUGHES COOPER, P.C.

By:

John Hughes Cooper, Esquire
SC Bar 1387

1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, SC 29464

843-883-9099; fax 843-883-9335

shiplaw@jhcocooper.com

ATTORNEYS FOR PLAINTIFFS

WE CONSENT:

KOUTEN LAW FIRM, LLC

By:

Peter A. Kouten, Esquire
SC Bar

P.O. Box 340

Johns Island, SC 29457

ATTORNEYS FOR DEFENDANTS,
HUCKABEE, SLADE, and BYRD

WE CONSENT:

Hon. Mary Frances Jowers
Assistant Attorney General
SC Bar

P.O. Box 11549

Columbia, SC 29211-1549

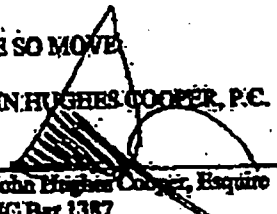
ATTORNEY FOR DEFENDANT,
ALAN WILSON, ATTORNEY GENERAL
FOR SOUTH CAROLINA

Consent Scheduling Order
2009-CP-10-3010

WE SO MOVE

JOHN HUGHES COOPER, P.C.

By:


John Hughes Cooper, Esquire
SC Bar 1387

1476 Ben Sawyer Blvd., Suite 7

Mt. Pleasant, SC 29464

843-883-9099, fax 843-883-9335

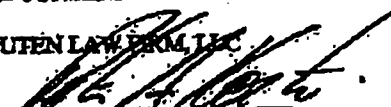
ship@law@jhc.com

ATTORNEYS FOR PLAINTIFFS

WE CONSENT:

KOUTEN LAW FIRM, LLC

By:


Peter A. Kouten, Esquire
SC Bar 74875

P.O. Box 340

Johns Island, SC 29457

ATTORNEYS FOR DEFENDANTS,

HUCKABEE, SLADE, and BYRD

WE CONSENT:

Hon. Mary Francis Jowers

Assistant Attorney General

SC Bar

P.O. Box 11549

Columbia, SC 29211-1549

ATTORNEY FOR DEFENDANT,

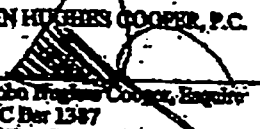
ALAN WILSON, ATTORNEY GENERAL

FOR SOUTH CAROLINA

Consent Scheduling Order
2009-CP-10-3010

WE SO MOVE

JOHN HUGHES COOPER, P.C.

By: 

John Hughes Cooper, Esquire
SC Bar 1387

1476 Bon Sawyer Blvd., Suite 7
Mt. Pleasant, SC 29464

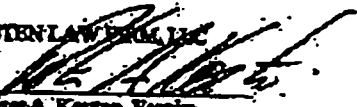
843-883-9099; fax 843-883-9335

shinlaw@hcooper.com

ATTORNEYS FOR PLAINTIFFS

WE CONSENT:

KOUTEN LAW FIRM, LLC

By: 

Peter A. Kouten, Esquire

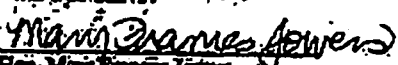
SC Bar 76875

P.O. Box 340

Johns Island, SC 29457

ATTORNEYS FOR DEFENDANTS,
HUCKABEE, SLADE, and BYRD

WE CONSENT:



Hon. Mary Frances Lowrey

Assistant Attorney General

SC Bar 108413

P.O. Box 11349

Columbia, SC 29211-1349

ATTORNEY FOR DEFENDANT,
ALAN WILSON, ATTORNEY GENERAL
FOR SOUTH CAROLINA

Common Pleas
Clerk: Julie Armstrong
Charleston County Judicial Center
Charleston, SC 29401
(843) 858-5000

Received From:	Cooper, John Hughes	Date: 9/25/2012
	John Hughes Cooper, Pc	Receipt #: 602818
	Sullivan's Island, SC 29482	Clerk: coceba
Paying for:	Fisher, Betty	
Transaction Type:	Payment	Reference #: 13515
Payment Type:	Check	Comment: consent scheduling order
	\$25.00	Non-Refundable
Total Paid:	\$25.00	

<u>Case #</u>	<u>Caption</u>	<u>Previous Balance</u>	<u>Amount Paid</u>	<u>Balance Due</u>
2009CP1003010	Alice Shaw Baker, plaintiff, et al VS Bessie Huckabee, defendant, et al	\$25.00	\$25.00	\$0.00



Total Cases:	1	\$25.00	\$25.00	\$0.00

Print

Page 1 of 5

Subject: RE: Shaw-Baker 2009-CP-10-3010 and 2012-CP-10-1332

From: Don Michel (DMichel@charlestoncounty.org)

To: shiplaw@jhcooper.com;

Cc: jtc@jhcooper.com; cain.denny@gmail.com; lfisher6736@yahoo.com;

Date: Friday, May 3, 2013 6:09 AM

Thank you. I will remove that one as well.

Don

Don Michel

Court Management Supervisor

Charleston County Clerk of Court

100 Broad St. Suite 106

Charleston, SC 29401

Direct: 843-938-5013

Fax: 843-958-5020



Track your cases at courtplus.org from any internet connected device.

From: shiplaw@jhcooper.com [mailto:shiplaw@jhcooper.com]

Sent: Friday, May 03, 2013 9:06 AM

To: Don Michel

Cc: John Townsend Cooper; Cain Denny; Lisa Fisher

Subject: w-Baker 2009-CP-10-3010 and 2012-CP-10-1332

EXHIBIT

B

mail.yahoo.com/nco/launch?.rand=4eqhhfoma09q6

5/27/2013

Print

Page 2 of 5

Dear Don:

Shaw-Baker v. Huckabee, 2009-CP-10-3010 (#2 on the jury roster) and Fisher v. Huckabee, 2012-CP-10-1332 (#107 on the jury roster) are the two related cases which are under advisement by Judge Nicholson. There were similar motions in both cases which must be decided before we can conduct discovery. Thank you.

Best regards,

John Hughes



JOHN HUGHES COOPER PC
ADMIRALTY & MARITIME LAW & CIVIL LITIGATION

John Hughes Cooper

SHIPLAW@JHCOOPER.COM

O 843-883-9999

F 843-883-9885

1470 Don Sawyer Blvd., Suite 7

Mount Pleasant, SC 29464

WWW.JHCOOPER.COM

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-----Original Message-----

Subject: RE: Shaw-Baker

From: Don Michel <DMichel@charlestoncounty.org>

Date: Fri, May 03, 2013 8:29 am

To: "shiplaw@jhcooper.com" <shiplaw@jhcooper.com>, Cain Denny

<cain.denny@gmail.com>

Cc: John Townsend Cooper <jtc@jhcooper.com>

Gentlemen, this case is not listed for trial next week. No one needs to attend this morning's meeting.

John Hughes, I would ask you about another one of yours that is listed. That's the Betty Fisher v. Bessie Huckabee. It's down towards to the bottom of the top 41. Just let me know.

Don

Don Michel

Court Management Supervisor

Charleston County Clerk of Court

100 Broad St. Suite 106

Charleston, SC 29401

Direct: 843-958-5013

Fax: 843-958-5020



Court Plus

Track your cases at courtplus.org from any internet-connected device.

From: shiplaw@thecooper.com [mailto:shiplaw@thecooper.com]
Sent: Thursday, May 02, 2013 5:37 PM
To: Cain Denny
Cc: John Townsend Cooper; Don Michel
Subject: RE: Shaw-Baker

Dear Cain:

Both Shaw-Baker cases are under advisement by Judge Nicholson, after a hearing on Motions heard at the end of November, 2012.

Upon decision on the Motions, the previous scheduling Order in the main case provides 120 days discovery, and in the abuse case Defendants will have to answer and we will need a scheduling order for discovery.

I talked to Don Michel about these cases several months ago. By copy of this email, I am

reminding Don of the status.

Best regards,

John Hughes



JOHN HUGHES COOPER PC
ADMIRALTY & MARITIME LAW & CIVIL LITIGATION

John Hughes Cooper

SHIPLAW@JHCOOPER.COM
O 843-883-9099
F 843-893-9335

1476 Ben Sawyer Blvd., Suite 7
Mount Pleasant, SC 29404
www.JHCOOPER.com

This electronic message contains information from the law firm of John Hughes Cooper, P.C.. The contents may be privileged and confidential and are intended for the use of the intended addressee(s) only. If you are not an intended addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this e-mail in error, please delete or otherwise destroy it as well as any attachments and contact me at SHIPLAW@JHCOOPER.COM.

----- Original Message -----

Subject: Shaw-Baker
From: Cain Denny <cain.denny@gmail.com>
Date: Thu, May 02, 2013 5:26 pm
To: John Cooper <shiplaw@jhcooper.com>, John Townsend Cooper <jtc@jhcooper.com>
Cc: Cain Denny <cain.denny@gmail.com>

Dear John Hughes and John Townsend:

What's the status of the Shaw-Baker case?

I see it's in the top 41 cases for the docket meeting tomorrow (Fri. 5/3/13 at 9:30am).

Best wishes.

Print

Page 5 of 5

Cain

Cain Denny, Esquire

Cain Denny, P.A.

P.O. Box 1205

Charleston, S.C. 29402

(843) 478-0692

cain.denny@gmail.com

KOUTEN LAW FIRM, LLC

8 Gillon Street
Charleston, South Carolina 29401
TEL: (843) 670-3919
FAX: (843) 559-4102

Mailing address:
PO Box 340
JOHNS ISLAND, SC 29457

2009-CP-10-3010
EMAIL: pkouten@gmail.com
www.elderlawcharleston.com

September 14, 2012

Charleston County Circuit Court
100 Broad Street
Charleston, SC 29401

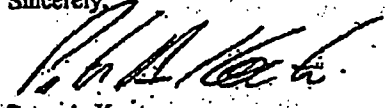
Re: Matter of Alice Shaw Baker
2009-CP-10-3010

Dear Clerk or Court,

Please find enclosed copy of Inventory and Appraisal filed in the Estate Division of the Charleston County Probate Court by the court appointed Personal Representative, Bessie Huckabee. I ask that you please file this in the file in your court at the above referenced case number.

Please contact me if you have any questions regarding this filing.

Sincerely,



Peter A. Kouten

PAK:sbd

W/Enclosures

CC: Client (without enclosure)
John Hughes Cooper, Esquire (without enclosure)
Cain Denny, Esquire (without enclosure)
The Honorable Henry McMaster, Attorney General (without enclosure)



2509-CP-10-3010

STATE OF SOUTH CAROLINA
COUNTY OF: CHARLESTON
IN THE MATTER OF: Alice Shaw-Baker

IN THE PROBATE COURT
INVENTORY AND APPRAISEMENT
CASE NUMBER: 2009-ES-10-00378

FILED
22 SEP 13 AM 9:43

☒ ORIGINAL
☐ SUPPLEMENTAL #

Personal Representative (c): Bessie Huckabee

Last Four Digits of Decedent's Social Security Number: 00000000
Decedent's Date of Death: 09/09/2009

Was there a will? ☒ YES ☐ NO
Domicile of death: Charleston SC
(county) (state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisal of all real and personal property of this estate so far as the undersigned is informed; that he/she has examined and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 12th day of September 2009

Notary Public for South Carolina
My Commission Expires 09/09/2013
Address: PO Box 340
Johns Island, SC 29457
E-Mail: phouder@jmail.com
Telephone: 843-789-9614

Signature: Bessie Huckabee

Name: Bessie Huckabee
Address: North Charleston, SC 29418

E-Mail:
Telephone (O):
(H):

Signature:
Name:
Address:

E-Mail:
Telephone (O):
(H):

For estates of decedents, the probate for marital variation of all similar, acquisition of status, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental Inventory should be utilized for correcting, adjusting or adding to an original inventory. A qualified and independent appraiser may be employed to appraise the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be included with the Report or Some Inventory Appraisal.

Within ninety (90) days following appointment, a copy of the inventory and appraisal shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.

RECAPITULATION

Schedule A - Real Estate
Schedule B - Stocks and Bonds
Schedule C - Notes Due Decedent and Cash
Schedule D - Insurance on Person's Life
Schedule E - Jointly Owned Property
Schedule F - Other Miscellaneous
Other Assets Payable to Estate
Schedule G - Transfers during Decedent's Life
Schedule H - Powers of Appointment
Schedule I - Annuities and Retirement Accounts
TOTAL GROSS VALUE
ENCUMBRANCES
TOTAL NET WORTH

Non-Probate	Probate
\$ -0-	\$ 92,200.00
TBD	TBD
TBD	TBD
-0-	-0-
322,842.78	40-
-0-	-0-
-0-	TBD
-0-	-0-
-0-	-0-
81,435.50	-0-
\$	TBD
(	TBD
\$	TBD

NOTE: WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED.

SCHEDULE A - Real Estate (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description (include county and state)	Tax Assessor's Fair Market Value for year of Decedent's Death	Appraised Value	Appraised Value of Decedent's Interest
1	29407 TMS Road, Charleston, SC	92,200		92,200

TOTAL SCHEDULE A \$ 92,200
(also enter under recapitulation, page 1)

SCHEDULE B - Stocks and Bonds (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Face Value	Appraised Value
1	Treasury Bonds Series HH (per Conservator- not verified)	123,750	TBD
2	Edward Jones Account (per Conservator- not verified)		8,186.00

TOTAL SCHEDULE B \$ TBD
(also enter under recapitulation, page 1)

SCHEDULE C - Notes due to Decedent, and Money on hand and in banks (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Value
1	Bank of America Account (per former conservator- not verified)	67,438.88
2	First Federal (per former conservator- not verified)	34,367.85
3	Social Security Deposits (per former conservator- not verified)	2,336.00
4	SC Retirement (per former conservator- not verified)	1,010.36
5	Wachovia Disbursement (per former conservator- not verified)	834.16
6	Federal Tax refund (per former conservator- not verified)	3,444.00
7	SC Tax refund (per former conservator- not verified)	384.00
8	Discover refund (per former conservator- not verified)	375.03
9	Interest Earned (per former conservator- not verified)	10.49
10	Bank of America checking (per former conservator- not verified)	67.20
11	separate attachment (per former conservator- not verified)	126,666.93

TOTAL SCHEDULE C \$ TBD
(also enter under recapitulation, page 1)

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE D - Insurance (If none, so state.)

Part 1 - Life Insurance Payable to the Estate

Item No.	Description	Value
1	none noted at this time (per former conservator- not verified)	

TOTAL PART 1

(also enter under recapitulation, page 1)

\$ -0-

Part 2 - Life Insurance Payable to Beneficiaries

Item No.	Description	Beneficiary	Value
1	National Life Insurance Company, Interpled Chas. County (accrued interest not calculated)	TBD	\$22,642.76

TOTAL PART 2

(also enter under recapitulation, page 1)

\$ 22,642.76

SCHEDULE E - Jointly Owned Property (with right of survivorship) (If none, so state.)

NOTE: You must complete Schedule E if the Decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is included in the gross estate.

Percentage Includable:

1 - Joint interest held by decedent and spouse - the amount included is one-half (50%) of the value in all cases.

2 - Other joint interest - Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show by a preponderance of the evidence that the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

Item No.	Description	Joint Owner(s)	Percentage Includable	Appraised Value of Decedent's Interest

TOTAL SCHEDULE E

(also enter under recapitulation, page 1)

\$ -0-

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE F - Miscellaneous Personal Property - (tangible personal property, employment bonus or award, interest in a partnership or unincorporated business, art collection or collections having silver objects or intrinsic value, etc.) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E.)

[illegible]**TOTAL SCHEDULE F**

3 TBD

(also enter under recapitulation, page 1)

NOTE: FOR SCHEDULES G, H, AND I, LIST VALUES ONLY IF PAYABLE TO ESTATE.

SCHEDULE G - Transfers During Decedent's Life - Transfers intended to take effect at death. United States Government Bonds, "Payable on Death", Trusts created by Decedent in which income for life was retained, power to revoke or other incidents of ownership retained, life insurance transfers. Life insurance transfers in which decedent retained a life estate or other incidents of ownership.

Did Decedent make any transfers during lifetime as described above?

☐ YES ☒ NO

(If "yes" please give date and type of transfer and list total amount payable to estate
(If more space is required, insert additional sheet of same size.)

TOTAL SCHEDULE G

§ 10.

(also enter amounts payable to estate under recapitulation, page 1)

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE H - Powers of Appointment - Property, both real and personal, over which Decedent possessed a Power of Appointment whether Testamentary or otherwise.

Did Decedent possess a Power of Appointment? ☐ YES ☒ NO

If "yes", did Decedent exercise the power of appointment in favor of estate? ☐ YES ☐ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ _____

TOTAL SCHEDULE H

(also enter amounts payable to estate under recapitulation, page 7)

\$ _____ -0-

SCHEDULE I - Annuities and retirement (IRA's, 401(k), Etc.)

Did Decedent own any accounts as described above? ☒ YES ☐ NO

If "yes", is the estate designated as the beneficiary of these accounts? ☐ YES ☒ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ -0-

SC Budget and Control Bd, SC Retirement Systems final death annuity payment Interpled to Chas. County \$8,189.38
South Carolina Deferred Compensation, Interpled to Chas. County \$75,248.24

TOTAL SCHEDULE I

(also enter amounts payable to estate under recapitulation, page 7)
FORM 706 (2008)

\$ _____ -0-

(If more space is required, insert tax schedules or additional sheets of same size.)

ENCUMBRANCES - (e.g., mortgages, liens, judgments, etc., but not general debts of the estate) - List specific assets encumbered.

[illegible]

TOTAL ENCUMBRANCES
(also enter under recapitulation, page 1)

\$ **TBD**

MANIFESTLY NON-TAXABLE

(To be completed by the Probate Court Judge in those cases where it appears that the estate is NOT REPORTABLE to the South Carolina Tax Commission under the provisions of the Estate Tax Laws of the State of South Carolina, i.e., the total gross value is indicated to be less than prescribed limits.)

It appears from the foregoing record of the above captioned estate on file in the Probate Court of this county, such estate is not reportable to the South Carolina Department of Revenue.

Executed this day of , 20

Probate Judge

(If more space is required, insert tax schedules or additional sheets of same size.)

Estate of Alice Shaw-Baker

2009-ES-10-00378

FILED

Inventory and Appraisement

12 SEP 13 AM 9:43

Schedule C continued

12	Check from Family Services, Inc. (per Conservator- not verified)	\$3,012.46
13	Blue Cross refund (per Conservator- not verified)	248.21
14	T-Mobile refund (per Conservator- not verified)	24.81
SUBTOTAL #12, 13, AND 14 Schedule C (per Conservator- not verified)		\$3,283.48

DISBURSEMENTS FROM FORMER CONSERVATORSHIP FINAL ACCOUNTING

Note that these line items are included under Schedule C as they are listed in Final Conservator Accounting (incorporated herein by reference) and they have not been approved by the Court and have not been justified in any way by the former conservator. (not verified by personal rep)

15	Caregivers	\$28,813.50
16	Household Expenses	11,731.26
17	Administrative Costs	53,806.00
18	Bills	2131.08
19	Donations	2855.00
20	Medical Expenses	17,473.05
21	Final Expenses	1113.95
22	Edward Jones account	5,381.61
SUBTOTAL DISBURSEMENTS FINAL ACCOUNTING		128,405.45
SUBTOTAL #12, 13, AND 14 Schedule C (per Conservator- not verified)		3,283.48
11	SUBTOTAL listed at #11 from Schedule C (per Conservator- not verified)	\$126,886.93

SCHEDULE C

ATTACHMENT TO ORIGINAL PRELIMINARY INVENTORY AND APPRAISEMENT

(NOT VERIFIED)

STATE OF SOUTH CAROLINA
COUNTY OF: CHARLESTON
IN THE MATTER OF: ALICE SHAW-BAKER

IN THE PROBATE COURT
PROOF OF DELIVERY

CASE NUMBER: 2009-ES-10-000378 2 SEP 13 AM 9:43

On the 12 day of September, 2012, I mailed or delivered the following document, Preliminary Inventory and Appraisal

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
Kay Passalunig	North Charleston, SC 29405
Sandra Byrd	Goose Creek, SC 29445
John Hughes Cooper, Esq.	1478 Ben Sawyer Blvd. 7, Mt. Pleasant, SC 29464
Cain Denny, Esq.	1808 Middle St, Sullivan's Island, SC 29482
Honorable Henry McMaster, Attorney General	Post Office Box 11549, Columbia, SC 29211

SWORN to before me this 13 day of September, 2012
Sam B. H. Donnick
Notary Public for South Carolina
My Commission Expires: 10/4/22

Signature: [Signature]
Name: Peter A. Kouten Esquire
Address: P.O. Box 340
Johns Island, SC 29457
Telephone (O): (843) 670-3919
(H):
E-mail: PKouten@gmail.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Betty Fisher

vs.

Bessie Huckabee, etal.

Plaintiff,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-1332

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: John H Copper, Bar No. 1387 Address: 1476 Ben Sawyer Blvd, 7 Mt pleasant, SC 29464 Phone: 8438839099 Fax 8438839335 E-mail: Other:	Defendant's Attorney: Peter A. Kouten, Bar No. 76875 Address: PO Box 340 Johns Island, SC 29455 Phone: 8436703919 Fax 8435594102 E-mail: Other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for Summary Judgment, Motion to Dismiss Estimated Time Needed: 1 hour Court Reporter Needed: ☒ YES ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. July 11, 2012 Date submitted	
SECTION III: Motion Fee ☐ PAID - AMOUNT: \$ ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☒ Other: Motion for Summary Judgment, Motion to Dismiss ☐ State Agency v. Indigent Party ☐ Post-Conviction Relief ☐ Motion for Execution (Rule 69, SCRPC)	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____	

EXHIBIT

D

(11/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

Betty Fisher,
Plaintiff,

v.
Bessie Huckabee, et al.,
Respondents.

**MOTION FOR
SUMMARY JUDGMENT
AND DISMISSAL OF ACTION**

COMES NOW the Respondents in the above action, seeking Motion for Summary Judgment and Motion to Dismiss. The Respondents respectfully requests this Honorable Court grant these motions.

GROUND\$ FOR DISMISSAL

- I. Plaintiff Betty Fisher has filed a Complaint in this court on April 27, 2009 and has refused to seek final hearing in this matter. The aforementioned Complaint filed under 2009-CP-10-3010 has as its base the same claims and therefore, this action should be dismissed under South Carolina Rules of Civil Procedure Rule 12(b)(8).
- II. Plaintiff Betty Fisher has failed to state a claim upon which relief can be granted and, as such, this motion shall be treated as one for summary judgment under South Carolina Rules of Civil Procedure Rule 56.
- III. Plaintiff Betty Fisher has yet to obtain a favorable determination that she has standing in any matter. This matter should be dismissed without prejudice until Plaintiff seeks a hearing on the determination on the validity of Alice Shaw-Baker's Last Will and Testament.

I.
Plaintiff's original complaint was filed more than three years ago and Plaintiff has not sought hearing on the core issue of the determination of the validity of the Last Will and Testament of the decedent. The Plaintiff sought Temporary Restraining Order of Personal Representative of the estate and the Court's restraining order indicated that the P.R. was restrained from all things. Upon motion for reconsideration, the Court allowed the P.R. to

continue administrative duties of the estate. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, appealed the Court's Order for Reconsideration and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, sought appeal en banc and was denied. Plaintiff, along with co-Plaintiff of the prior action, Lisa Fisher, have appealed the Motion for Reconsideration, which merely granted the P.R. authority of administrative duties, to the South Carolina Supreme Court. The appeal to the Supreme Court has nothing to do with the validity of decedent's Last Will, yet, Plaintiff has declined to seek hearing and determination of the Last Will's validity.

Co-Plaintiff of the prior action, Lisa Fisher, was the prior Conservator for the decedent prior to her death. Lisa Fisher was removed by the probate court as conservator and was ordered to turn over the estate assets to a financial intermediary. Lisa Fisher has filed appeal of the probate court order and has refused to turn over the estate assets. Evidence exists that Lisa Fisher has continued to expend estate assets without authority and after she had been removed as conservator.

Plaintiff has merely to have this Court determine whether the Last Will is valid or it is not. All other issues are directly related to the issue of the validity of the Last Will. Respondents ask that the Court dismiss this action and order the Plaintiff to seek final hearing in the prior Complaint.

II.

Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's prayer seeks relief which can only be granted upon determination of a prior Complaint. Respondent's ask this Honorable Court to Dismiss this action without prejudice until such time as a determination in the prior action may be had.

III.

Plaintiff and her representatives had access to decedent's home when she was deemed a vulnerable adult. Plaintiff and her representatives had access to the decedent's records, files and the entire contents of the house. Plaintiff and her representatives removed contents of the home including the decedent's Last Will. Upon the death of decedent, it was a representative for the Plaintiff who was in possession of the original Last Will and who turned over the original Last Will to the probate court so that Respondent Bessie Huckabee could be appointed. The probate court, upon appointment of the conservator, sought copy of the Last Will for the Guardianship/Conservatorship file and the Last Will copy was filed with the probate court therapeutic division by the conservator or her representative. The only ones with access to the decedent's records and files were the Court-Appointed Guardian, the Plaintiff and her representatives. This matter should be dismissed with prejudice until Plaintiff seeks a hearing on the determination on the validity of Alice Shaw-Baker's Last Will and Testament.

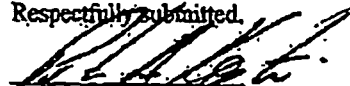
CONCLUSION

WHEREFORE, based upon the foregoing, Respondents respectfully requests this Honorable Court to:

1. Dismiss Plaintiff's Complaint without prejudice until the Court can hear and make a determination on the prior complaint.

2. Order that the Plaintiff seek final hearing on the matter of determining the validity of decedent's Last Will and Testament.
3. Allow Respondent's recovery of costs and fees associated with defense of this action, and
4. Any such further relief deemed by this Honorable Court.

Respectfully submitted,

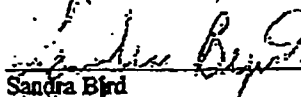


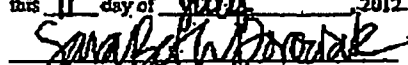
Peter A. Kouten
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
(843) 670-3919
Attorney for Respondents

July 11, 2012
Charleston, South Carolina

VERIFICATION

I, Sandra Bird, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.


Sandra Bird

Sworn to and subscribed before me
this 11 day of July, 2012.

Notary Public for South Carolina
My commission expires: 10/4/22

VERIFICATION

I, Bessie Huckabee, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.

Bessie Huckabee
Bessie Huckabee

Sworn to and subscribed before me
this 11 day of July, 2012.
Sharon B. Doozick
Notary Public of South Carolina
My commission expires: 10/4/22

VERIFICATION

I, Kay Passailaigue, declare and verify that the foregoing motion has been duly prepared on my behalf, that the facts and allegations herein are true and correct to the best of my knowledge, information, and belief. I declare under penalty of perjury that the foregoing is true and correct.

Kay Passailaigue
Kay Passailaigue

Sworn to and subscribed before me
this 11 day of July, 2012.
Sarah Beth Prociak
Notary Public of South Carolina
My commission expires: 10/4/22

KOUTEN LAW FIRM, LLC

8 Gillon Street
Charleston, South Carolina 29401
TEL: (843) 670-3919
FAX: (843) 559-4102

Mailing address:
PO Box 340
JOHNS ISLAND, SC 29457

EMAIL: pkouten@gmail.com
www.elderlawcharleston.com

July 11, 2012

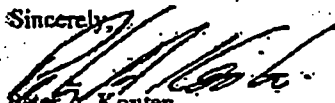
Charleston County Circuit Court
100 Broad Street
Charleston, SC 29401

Re: Fisher v. Hackabee
2012-CP-10-1332

Dear Clerk of Court:

Please find enclosed Motion for Summary Judgment and Motion to Dismiss in the above matter with Motion fee enclosed. I have also enclosed copies to be clocked and returned in self addressed stamped envelope for my file. Please contact my office if you have any questions regarding this filing. Please contact me when your docket clerk is available so that we may set hearing on this matter.

Sincerely,


Peter A. Kouten

w/ enclosure

CC: clients
John Hughes Cooper, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Betty Fisher,
Plaintiff,

v.
Bessie Huckabee, et al.,
Respondents.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

SUPPLEMENTAL MEMORANDUM
SUPPORTING MOTION FOR
SUMMARY JUDGMENT
AND DISMISSAL OF ACTION

FILED
2012 DEC 20 AM 11:50
CLERK OF COURT

COMES NOW the Respondents in the above action, seeking Motion for Summary Judgment and Motion to Dismiss. Peter A. Kouten, as Defendant in the present action, upon request of the Court, herein provides supplemental memorandum in Support of Defendant's Motion for Summary Judgment and Motion for Dismissal of this action.

QUESTIONS PRESENTED

- I. Does the Circuit Court have jurisdiction to address the Complaint brought by the Plaintiff under the Omnibus Adult Protection Act?
- II. Does a Plaintiff, who is not the Court-Appointed personal representative for an estate, have standing to bring a survival action under the Omnibus Adult Protection Act asserting her claim on behalf of the decedent as "real representative" of the estate?
- III. Additional arguments of the Plaintiff should be disregarded as they were not sought by the trier of fact.

DISCUSSION

I.

I. Does the Circuit Court have jurisdiction to address the Complaint brought by the Plaintiff under the Omnibus Adult Protection Act?

No, the Circuit Court lacks jurisdiction as the Omnibus Adult Protection Act explicitly and procedurally requires a report to be filed within two days of the allegations of abuse, neglect, or exploitation and any actions, petitions and hearings to follow the report must proceed in the family court.

The Omnibus Adult Protection Act (hereafter "The Act"), enacted in 1993, requires that any person with knowledge of abuse, neglect, or exploitation of a vulnerable adult shall report the incident within twenty-four hours of the alleged incident. South Carolina Code Ann. Section 43-35-25 The report must be made to Department of Social Services Adult Protective Services. These reporting requirements are mandatory. Id. If DSS has reasonable suspicion of



criminal conduct, the report and investigation must be forwarded to local law enforcement or the South Carolina Law Enforcement Division (SLED) within one working day of completing the review. South Carolina Code Ann. Section 43-35-40

Subsequent to the reporting and investigation stage, the Adult Protective Services Program may petition the *family court* (emphasis added) for an order to provide protective services. South Carolina Code Ann. Section 43-35-45. The family court has exclusive jurisdiction to seek protection of the alleged vulnerable adult under The Act. A hearing must be held within forty days of the petition being filed in the *family court* (emphasis added) and Adult Protective Services must conduct a comprehensive evaluation of the vulnerable adult prior to hearing. Id. Section 43-35-50 and 80 of The Act addresses the possibility of civil or criminal proceedings which may result after hearing.

Here, the decedent died in a hospital as the result of complications with cancer. Pro Hac Vice attorney for Plaintiff, Lisa Fisher, was the legal guardian of decedent at the time of her death. It is clear that any civil proceeding brought under this Act would have first required "a report made pursuant to this chapter" as its basis. There was no contemporaneous report of abuse filed with DSS. There was no investigation and there was no court order after hearing. Since the Plaintiff has not proved that she has pursued the necessary actions precedent through DSS and no determination or finding by the family court that any defendant violated the Act, Plaintiff has not met the burden of establishing that this Court has jurisdiction to hear actions allegedly brought under the Act.

Further, Plaintiff discusses at length statutory interpretation and rules of construction in her Supplemental Memorandum. Here, the plain and ordinary meaning of the Omnibus Adult Protection Act is for the sole purpose of identifying vulnerable adults who are subject to abuse and, if found, immediately acting to remove said vulnerable adult from the abusive situation. The requirement is immediate, while the alleged vulnerable adult is allegedly being abused, not several years after her death. Plaintiff, under the strict interpretation of the Act, has not perfected her claim under the Act. Therefore, Plaintiff's claims under the Act should be Dismissed.

DISCUSSION

II.

II. Does a Plaintiff, who is not the Court-Appointed personal representative for an estate, have standing to bring a survival action under the Omnibus Adult Protection Act asserting her claim on behalf of the decedent as "real representative" of the estate?

No, Plaintiff does not have standing. The Law of Real Representative is an enlargement of the power of the Court-Appointed personal representative and grants the personal representative of an estate, who, prior to 1904, could satisfy estate claims with personal assets only. The Law of Real Representative and Land Transfer Acts gave the personal representative power to marshal the real estate of the decedent to

pay estate claims and has no nexus to the Omnibus Adult Protection Act or any other action brought on behalf of the decedent.

Real Representative

In Black's Law Dictionary published 1910, a real representative is defined as follows:

He who represents or stands in the place of another with respect to his real property, is so termed, in contradistinction, to him who stands in place of another; with regard to his personal property, and who is termed the personal representative.

"An heir is a representative of his ancestor and the executor is the representative of the testator, the heir standing in the place of his deceased ancestor with respect to his realty, the executor standing in the place of his deceased testator with respect to his personality..."

Black's Law Dictionary, 2nd Edition, 1910 pg 1020-1021

Further definition of a real representative can be found in the publication, The Real Representative Law, published in 1898. This publication is informative in its discussion of the prior difference between authority over both personal property of decedent and real property of decedent.

The Land Transfer Act of 1875, originally enacted in England and Wales, and amended with the Land Transfer Act of 1897, introduced an important amendment to the general law which separated the real and personal property by making real estate vest in the personal representative. Prior to this act and its predecessors, creditors "under seal" as mortgagors may claim an interest in the decedent's real property so encumbered. These creditors faced difficulty seeking repayment as the real property vested in the heirs at death. Further, those creditors who were not considered under seal, those not having a security interest in the real property, did not have legal recourse to seek payment of their claim from the decedent's real property. The Real Representative Law, 1897, being part I. of the Land Transfer Act, 1897, and a discussion on administration thereunder (1898). W. Clowes and Sons, London 1898. (See publication online at <http://archive.org/stream/realrepresentati00tyss#page/n5/mode/2up>)

The Land Transfer Acts ceased the automatic transfer of real property to the testate devisee or intestate heir at law and allowed the personal representative the authority to access the real property for the payment of all proper debts of the estate. As the personal representative under current code has authority over all property of the decedent, real and personal, the personal

representation and real representative, as appears in the survival statute, are one in the same and, if there be a modern day distinction between the two, it is a distinction without a difference.

Additionally, The South Carolina Probate Code specifically designates and places upon the personal representative of a decedent's estate standing to sue on behalf of the decedent. South Carolina Probate Code Ann. Section 62-3-703 Further, a personal representative is granted the authority to prosecute estate claims. South Carolina Probate Code Section 62-3-715(20) The South Carolina Probate Code grants standing to sue on behalf of a decedent to the court-appointed personal representative. These statutes provide certainty to anyone who has dealings with the estate that authority is centralized, without question, in the appointed representative.

Plaintiff, in her Supplemental Memorandum, discusses the survival statute and concludes that the legislature "specifically gave authority to the real representative to bring this action." The Plaintiff does not provide reference as to the definition of real representative. Here, the Defendant has provided ample review of the law of real representatives with historical background. Defendant has provided a definition of real representative. It would appear that reference to the real representative in the survival statute of the South Carolina Civil Code Section 2859 of 1902 had the original intent to address "causes of action for injuries and trespass to real estate"¹ by the real representative. With the current probate code, the personal representative controls all decedent's property, real and personal. Defendant has provided statutory reference and case law to those persons with authority to sue and each includes the personal representative or co-personal representatives. Finally, if there be any spark of life still vested in what is termed "real representative" it would not extend beyond questions or issues with real property. The Plaintiff's actions are not grounded in real property and thus, are not actions which were intended to be authorized by a real representative, if such distinction today exists. Based on the foregoing, Plaintiff's actions should be Dismissed for lack of standing.

¹ South Carolina Survival Statute: SOUTH CAROLINA CODE SECTION 15-5-90. Survival of right of action. Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding. HISTORY: 1962 Code Section 10-209; 1952 Code Section 10-209; 1942 Code Section 419; 1932 Code Section 419; Civ. P. '22 Section 375; Civ. C. '12 Section 3963; Civ. C. '02 Section 2859; R.S. 2323; 1892 (21) 18; 1905 (24) 945.

12-1332

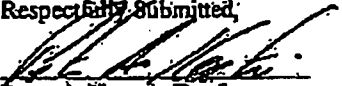
DISCUSSION

III.

Defendant objects to Plaintiff's taking license to supplement her memorandum with additional arguments which are unsolicited and act to complicate the issues in her Complaint. Plaintiff has taken the transcript out of context and assumes that the statement of misunderstanding has a meaning other than the intended meaning. What the Defendant did not understand is that a conservator, Lisa Fisher, appointed by the probate court and under the jurisdiction of the probate court would provide to the estate division an original Last Will of the decedent after indicating its existence to the commitment division and then contesting the Last Will. Plaintiff does not have standing in this action and therefore, her actions should be Dismissed.

WHEREFORE, Defendant respectfully requests that this Honorable Court Grant defendant's Motion for Summary Judgment and Dismiss all counts of the Plaintiff's Complaint.

Respectfully Submitted,

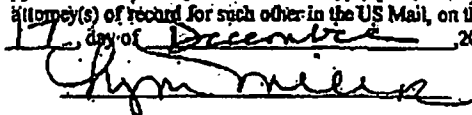

Peter A. Kouten, Esquire
P.O. Box 340
Johns Island, S.C. 29457
Office: (843) 670-3919
Fax: (843) 559-3162
pkouten@gmail.com

Charleston, South Carolina
December 17, 2012.

Counsel served: John T. Cooper, Esquire
John H. Cooper, Esquire
Lisa Fisher, Esquire (c/o John H. Cooper, PC)
1476 Ben Sawyer Blvd.
Mt. Pleasant, SC 29464

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading to which this certificate is affixed was served upon the Party(s) to this action by depositing a copy of the same, enclosed in a first class, postpaid envelope properly addressed to the Attorney(s) of record for such other in the US Mail, on this, 17 day of December, 2012.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

BETTY FISHER and LISA FISHER,

Plaintiff,

v.

BESSIE HUCHABEE, et al.,

Defendants.

In the Matter of the Estate of
Alice Shaw-Baker.
Charleston County Probate
No.: 2009-ES-10-0378

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: ~~08-CP-10-3010~~,
12-CP-10-1332

NOTICE OF APPEARANCE

2013 AUG - 6 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The undersigned hereby enters his appearance as counsel of record for Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailaigue in the above styled case. All papers to be served on the Defendants should be delivered to the undersigned at the addresses set out below.

Respectfully submitted,
THE LAW OFFICE OF
W. WESTBROOK WILLS III


W. Westbrook Wills III
S.C. Bar No.: 76681
38 Broad Street, Suite 200
Charleston, SC 29401
Tel: 843.805.6300
wwills@wwillslaw.com
ATTORNEY FOR DEFENDANTS

CHARLESTON, SC
August 6, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

BETTY FISHER and LISA FISHER,)

Plaintiff,)

v.)

BESSIE HUCHABEE, et al.,)

Defendants,)

In the Matter of the Estate of)
Alice Shaw-Baker.)

Charleston County Probate)

No.: 2009-ES-10-0378)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

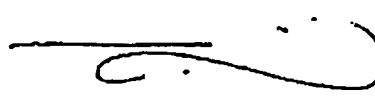
CASE NO.: 12-CP-10-1332
08-CP-10-3010

CERTIFICATE OF SERVICE

FILED
2013 AUG -6 PM 1:49
CLERK OF COURT
ALICE J. ARMSTRONG

I certify that on this date a copy of the foregoing *Notice Of Appearance* was served on each party or counsel of record by hand delivery and/or U.S. Mail in the manner prescribed by the applicable Rules of Civil Procedure.

This 6th day of August 2013.


W. Westbrook Wills III

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

BETTY FISHER, as Real Representative)
for Alice Shaw Baker,)
Plaintiff,)

v.)

BESSIE HUCKABEE et al)
Defendants,)

OBJECTIONS AND OPPOSITION BY
PLAINTIFF BETTY FISHER
TO NOTICE OF APPEARANCE
FILED BY COUNSEL W. WESTBROOK
WILLS ON AUGUST 6, 2013;

MEMORANDUM OF LAW

FILED
2013 OCT -4 PM 2:53
JULIE J. ARMSTRONG
CLERK OF COURT

COME NOW Plaintiff Betty Fisher and formally objects to the *Notice of Appearance* filed on behalf of Defendants Bessie Huckabee (erroneously referenced as "Bessie Huchabee" in the heading), Sandra Byrd, and Kay Passailaigue ("Defendants") on or about August 6, 2013 naming W. Westbrook Wills as counsel (Attached hereto is a true and correct copy of said *Notice* and the correspondence marked as Exhibit A).

This objection is made to inform the court of the fatally defective *Notice of Appearance* (Exhibit A) and to secure a ruling on plaintiff's *Motions for Disqualification against Attorney Peter Kouten*. Due Process mandates examination of the true facts in this case, and disqualification of Attorney Kouten as a matter of law.

As indicated in the August 6, 2013 correspondence to the clerk from Attorney W. Westbrook Wills, Defendants are attempting to maintain Peter Kouten as counsel:

"Peter Kouten will remain as counsel for the Estate of Alice Shaw Baker." (Emphasis added)

As set forth herein, Defendants blatant attempt to Plaintiff's *Motion for Disqualification of Peter Kouten*, by the filing of the *Notice of Appearance* by W. Westbrook Wills, is but one reason that the *Notice of Appearance* is fatally defective.

The motion for disqualification has yet to be ruled on. The parties argued the motion on or about November 28, 2012, and this court has not issued its ruling. There is currently a hearing on October 8, 2013 before the Honorable Judge Nicholson to determine Plaintiff's *Motion to Alter, Amend, Reconsider, and Vacate Order of May 8, 2013*. This order erroneously granted Defendants' *Motion for Summary Judgment*.

Plaintiff is entitled to a ruling on the *Motion for Disqualification of Counsel Peter Kouten*, in light of the harm that he has done to the decedent's estate, the elder abuse Alice Shaw Baker suffered, and his unlawful interference with the appropriate distribution of Alice Shaw Baker's estate to Animal Charities.

Said *Notice of Appearance* is in violation of the procedures set forth in Rule 11(b) of the South Carolina Rules of Civil Procedure and the legal authority set forth in *Collins*

Entertainment Corp. v. Columbia "20" Truck Stop, Inc., 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000).

I.

BACKGROUND INFORMATION

Alice Shaw Baker ("Ms. Shaw Baker") died on February 25, 2009. Prior to that time, the court appointed Peter Kouten as her counsel in the conservatorship case. Instead of fulfilling these duties on behalf of Ms. Shaw Baker, He has at all times acted on behalf of the Defendants, both while Alice Shaw Baker was alive and after her death, creating a non-waiveable conflict of interest.

The machinations of Defendants have required repeated efforts by Plaintiff to protect the rights of Ms. Shaw Baker. Plaintiff continues to seek justice on her behalf and ensure proper due process and compliance with the law.

Currently set for hearing on October 8, 2013 is Plaintiff's *Motion to Alter, Amend, Reconsider, and Vacate Order of May 8, 2013*. The previously filed *Motion for Disqualification of Peter Kouten* has not been ruled upon yet. This motion deals with the improper conflicted and adverse representation by Peter Kouten

//

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//

//

II.
**DEFENDANTS ARE NOT PERMITTED TO IGNORE THE MANDATES
OF RULE 11**

Defendants' transparent attempt to proceed with this case without waiting for this court's proper ruling on the *Motion to Disqualify Attorney Kouten* can not be justified. The *Notice of Appearance* filed on or about August 6, 2013 does not resolve the issues set forth in the *Motion to Disqualify Attorney Kouten*.

Further, the *Notice* is fraught with procedural errors, including erroneous case number, misspelling of Defendant Huckahee's name, lack of consent by clients, and most importantly, lack of court order.

As interesting is the correspondence of August 6, 2013 which intends to separate the duties of Peter Kouten as counsel in this case. The estate case 2009-CP-10-3010 is a removal case, dealing with the estate of Alice Shaw Baker. Defendant Kouten may not remain as counsel in the underlying case—the conflict remains. Since the Court has not ruled on the pending motion for disqualification, no findings have yet been made related to the numerous reasons for Attorney Kouten's disqualification, including but not limited to the fact that Attorney Kouten, as guardian ad litem, had a duty of advocating and protecting the best interests of his ward, Alice Shaw Baker. Under laws governing a guardian ad litem, he should not have, in future proceedings, represented any parties with interests opposed to the best interests of his former ward. (*Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), emphasis added.) All of these issues support Plaintiff's *Motion for Disqualification* in this case, as Ms. Shaw Baker was a vulnerable adult.

Allowing Attorney Kouten to appear in *any* capacity in this case is prohibited by this relevant legal authority, and must be decided by this Honorable Court by way of the previously filed motion for disqualification of Attorney Kouten. Plaintiff respectfully requests that the court set this motion.

Therefore, Plaintiff contests this *Notice*, because it was signed and filed by an attorney who was "not of record" in this case which renders it a legal nullity (See *Collins Entertainment Corp. v. Columbia "20" Truck Stop, Inc.*, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000)).

Rule 11, SCRPC, provides, the procedure for proper substitution of an attorney:

"An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of Court, and not otherwise." (emphasis added).

In this case, there is no written consent by the clients, by relieved counsel, or by opposing counsel of the substitution of attorney and there is no mandatory court order pursuant to Rule 11(b). The court in *Culbertson v. Clemens*, 322 S.C. 20, 25 (1996) held:

"In all actions, it is of vital importance, not only to the parties involved but to the court as well, that the correct attorneys are listed as the attorneys of record. The best way to achieve this is by strict adherence to Rule 11(b), which was designed to eliminate any confusion regarding which attorneys are representing parties by requiring that any changes be made by application to the court." (Emphasis added)

The court further explained in *Collins Entertainment Corp. v. Columbia "20" Truck Stop, Inc.*, 343 S.C. 257, 539 S.E.2d 699 (S.C. 2000) that:

"Strong policy considerations dictate that a client and the court must be unequivocally informed when an attorney intends to withdraw from representing a party, for whatever reason. Equally strong policy considerations dictate that the court must, by order, approve a client's discharge of an attorney of record in a court proceeding."
(Emphasis added)

Attorney Kouten has purposefully and blatantly continued to represent clients (Defendants herein) who have an adverse interest to the true intentions of Alice Shaw Baker—his former client and his ward. This is improper, and Plaintiff objects to the *Notice* and any failure to adhere to Rule 11.

III

PRAYER

Due to the fatal procedural defects, Attorney W. Westbrook Wills is not attorney of record. Plaintiff objects to his *Notice of Appearance* in that it does not comply with South Carolina law and puts plaintiff (and this court) in the ethical quandary of not knowing who is properly representing the parties.

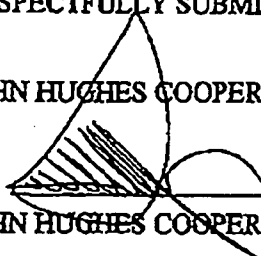
Plaintiff further objects because the *Notice of Appearance* attempts to interfere with the timely ruling on their *Motion for Disqualification* and the proper orders that are necessitated by the motion.

//

WHEREFORE, Plaintiff respectfully requests that the court consider the notice of appearance a nullity and rule on Plaintiff's *Motion for Disqualification* removing Peter A. Kouten from representation of any party in this matter due to his conflict of interest.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEY FOR PLAINTIFF

October 4, 2013

THE LAW OFFICE OF
W. WESTBROOK WILLS III

W. WESTBROOK WILLS III
Admitted to Georgia & South Carolina Bars

CIVIL TRIAL LAWYER
38 BROAD STREET
SUITE 200
CHARLESTON, SC 29401

TELEPHONE: (843) 825-6300
FACSIMILE: (843) 922-8596
wwills@wwillslaw.com

August 6, 2013

John Hughes Cooper, Esq.
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mount Pleasant, SC 29464

Lisa Fisher, Esq.
c/o John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mount Pleasant, SC 29464

Cain Denny, Esq.
Cain Denny, P.A.
PO Box 6
Sullivan's Island SC 29482

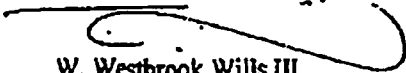
Peter Kouten, Esq.
Kouten Law Firm, LLC
8 Gillon St
Charleston, SC 29401

RE: Fisher v. Huckabee et al., Civil Action Nos.: 2009-CP-10-3010 and
2012-CP-10-1332. Notice of Appearance of Counsel

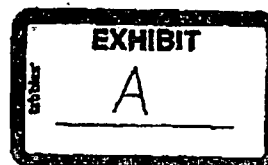
Dear Counsel:

Please find enclosed the Notice of Appearance I filed with the court this morning in the above-referenced cases. I will be representing Bessie Huckabee, Sandra Byrd, and Kay Passailaigue in the Will contest. Peter Kouten will remain as counsel for the Estate of Alice Shaw-Baker. I look forward to working with you in this matter.

Sincerely,


W. Westbrook Wills III

Enclosure (as stated)



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

BETTY FISHER and LISA FISHER,

Plaintiff,

v.

HESSIE HUCHABEE, et al.,

Defendants.

In the Matter of the Estate of
Alice Shaw-Baker,
Charleston County Probate
No.: 2009-RS-10-0378

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 08-CP-10-3010

12-CP-10-1332

NOTICE OF APPEARANCE

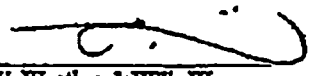
JULIE J. ARMSTRONG
CLERK OF COURT

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The undersigned hereby enters his appearance as counsel of record for Defendants Besale Huchabee, Sandra Byrd, and Kay Passailaigue in the above styled case. All papers to be served on the Defendants should be delivered to the undersigned at the addresses set out below.

Respectfully submitted,
THE LAW OFFICE OF
W. WESTBROOK WILLS III


W. Westbrook Wills III
S.C. Bar No.: 76681
38 Broad Street, Suite 200
Charleston, SC 29401
Tel: 843.805.6300
wwills@wwillslaw.com
ATTORNEY FOR DEFENDANTS

CHARLESTON, SC
August 6, 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

BETTY FISHER and LISA FISHER,

Plaintiff,

v.

BESSIE HUCHABEE, et al.,

Defendants,

In the Matter of the Estate of
Alice Shaw-Baker.
Charleston County Probate
No.: 2009-ES-10-0378

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 08-CP-10-3010

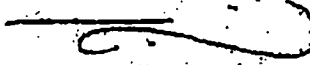
CERTIFICATE OF SERVICE

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JILL J. ARMSTRONG
CLERK OF COURT

FILED

I certify that on this date a copy of the foregoing *Notice Of Appearance* was
served on each party or counsel of record by hand delivery and/or U.S. Mail in the
manner prescribed by the applicable Rules of Civil Procedure.

This 6th day of August 2013.


W. Westbrook Willis III

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker,

Plaintiff,

v.

BESSIE HUCKABEE et al

Defendants,

SUPPLEMENTAL BRIEF
RE: MOTION BY PLAINTIFF BETTY
FISHER TO ALTER, AMEND, RECONSIDER,
AND VACATE ORDER OF MARCH 8, 2013;
MEMORANDUM; AFFIDAVIT OF JOHN
HUGHES COOPER

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JULIA A. STRONG
COURT REPORTER
JOHN HUGHES COOPER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Betty Fisher, Real Representative for Alice Shaw Baker ("Plaintiff"), by and through her undersigned counsel,¹ appreciates this opportunity to provide this court with a final on point analysis of the issues presented, without repeating (or waiving) any of the stated issues set forth in her briefing of this case:

SOUTH CAROLINA LAW SUPPORTS PLAINTIFF'S EFFORTS TO FIGHT FOR ALICE SHAW BAKERS' RIGHTS BY THE PROSECUTION OF THIS LAWSUIT.

This court's preliminary conclusion that dismissal of this action based on plaintiff's standing would preclude suit against defendants is correct. Alice Shaw Baker's survival action would be forever

¹ Betty Fisher and Lisa Fisher are petitioners ("Petitioners") in the underlying will contest/removal action. (*Baker v. Huckabee*, 2009-CP-10-3010). Said action will be referred herein as "Will Contest".

lost, and the harm she suffered would never be vindicated. However, South Carolina law does not support dismissal.

The court in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176 (1955) held specifically that:

"If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In so doing, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust. Bogert, Trusts and Trustees, Section 870, page 461;² 54 Am. Jur., Trusts, Section 591, page 457; *Brun v. Mann*, 8 Cir., 151 F. 145, 12 L.R.A., N.S., 154; *O'Beirne v. Allegheny & K.R. Co.*, 151 N.Y. 372, 45 N.E. 873. And compare *Fogg v. Middleton*, 2 Hill Eq. 591." (Emphasis added)

The South Carolina Supreme Court went on to say that:

"The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death. Its applicability to such actions is discussed in the annotation following *Cudney v. United Power & Light Corp.*, 1935, 142 Kan. 613, 51 P.2d 28, in 101 A.L.R. 835, at pages 840 *et seq.*, with the comment that "in the few cases discovered where, upon the failure of an executor or administrator to perform his duty as the only proper party to

² Counsel informs this court that the internal citation referencing Bogert, Trusts and Trustees, is not the current section. Attached hereto is a true and correct copy of the pertinent section from the most recent version of Bogert, *The Law of Trusts and Trustees*, § 869, ch. 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119. Said section outlines the very nature of the problem and the reasons courts have found alternative remedies:

"If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties. There is danger that the cause of action may be barred by laches or the operation of the Statute of Limitations, if the beneficiary is obliged to wait for the trustee to act, or is forced to sue the trustee to compel action, or to bring a proceeding for the removal of the trustee and the appointment of a successor. In addition the financial condition of the third party may change so that all relief will be shut off. In such an emergency the court permits a suit in equity by the beneficiary to enforce the cause of action running to the trustee, in which case the third party and the trustee should be made parties defendant. The beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary." (Attached hereto are true and correct copies of the pertinent pages of the treatise marked as Exhibit A).

bring or prosecute an action under the death statute, the beneficiary has started suit to recover damages for the death, the courts have upheld the right of the beneficiary to begin such action." (Emphasis added)

The impact of this decision can not be overstated. It provides for third party standing in wrongful death cases. Under 15-51-20, wrongful death actions are to "...be brought by or in the name of the executor or administrator," there is no exception stated in the statute. However, as previously pointed out, the survival action code, South Carolina Code Ann. § 15-5-90 specifically provides that survival actions "shall survive both to and against the personal or real representative...of a deceased person." (See also *Duke v. Postal Telegraph Cable Co.*, 71 S.C. 95 (SC 1905)[heirs at law are the real representatives].)³ In this case, the blatant conflict leads to the same type of "temporary trustee" addressed in *Bailes, supra*.

Here, Defendant Bessie Huckabee is merely the named executor in a revoked will. She is not a beneficiary for any purposes, and she has never even attempted to comply with the order for her to be bonded. The other defendant Kay Passailague Slade previously operated (and represented to Alice Shaw Baker) that she owned an animal rescue.

Plaintiff has attached pertinent pages of discovery from the Will contest suit to this supplement for the court's consideration marked as Exhibit B, ING 16-17. Although these documents relate to insurance proceeds, they are compelling in their illustration of Alice Shaw Baker's devotion to animals. Said documents clearly state that:

"Kay Passailague Relationship: Custodian of Pets and
Rescue-Governed by Will 249-088594"

³ It is important to remember that Betty Fisher is the great niece of Alice Shaw Baker, and therefore an "heir at law." Additionally, plaintiff previously filed a petition for appointment as administrator, therefore if successful in the Will contest litigation, she will be the duly appointed administrator, not *Huckabee*. (Attached hereto as Exhibit D is a true and correct copy of the Clocked copy of Petition for Formal Testacy and Appointment in the estate case, 2009-ES-10-0378.)

In separate correspondence regarding the death benefits of the South Carolina Retirement System, notes indicate:

"Said Current Bene[ficiary] works on a dog rescue and the money to go to the dog rescue."

(Attached hereto is a true and correct copy of said document marked as Exhibit C, SCRS 18)

As set forth above, plaintiff has support under both South Carolina statutory law and case law to proceed with this case for the benefit of Alice Shaw Bakers' true beneficiaries—animal charities. Protecting the elderly from victimization by others should also permit family to protect the destruction of their rights and prevent the running of the statute of limitations. Plaintiff believes that the law in *Bailes* does just that.

Plaintiff respectfully requests that the court adopt its rationale set forth at the hearing, and allow plaintiff to proceed with the prosecution of this action.

II. CONTRARY TO DEFENDANTS' POSITION, SOUTH CAROLINA LAW SUPPORTS A PRIVATE RIGHT OF ACTION FOR EXPLOITATION OF VULNERABLE ADULTS UNDER THE OMNIBUS ACT

Despite Defendants' contention that the South Carolina Omnibus Adult Protection Act (S.C.Code 1976, §§ 43-35-5(4, 5), 43-35-80) ("Omnibus Act") must be contemporaneous with the act, South Carolina law does not support this misinterpretation of this statutory scheme. In *Williams Garrett v. Murphy*, 106 F.Supp.2d 834 (2000), the court held that the legislature intended to create a Private cause of action "to protect vulnerable adults from abuse, neglect, and exploitation." (See also *Williams v. Watkins*, 665 S.E.2d 243, 379 S.C. 530 (2008).) This constitutes an important tool in the effort to prevent widespread physical and financial abuse of the elderly.

Actions like those of defendants will never be stopped, without some ability to seek civil redress. To effectuate its purposes, the "Omnibus" Act provides for a panoply of remedies, and by implication, gives standing to third parties. Logically, if third parties do not have standing, then the scheme would be meaningless, because vulnerable adults would not be able to obtain necessary assistance. The Legislative scheme recognizes this vulnerability, and provides the means to effectuate recovery on behalf of the Elderly. Not only does defendants' interpretation of the "Omnibus Act" effectively defeat the legislative purpose, it runs afoul of the "emergency" conditions which are recognized in the teaching of *Bailes*.

III.
**PLAINTIFF RESPECTFULLY REQUESTS THAT THE COURT RULE ON HER MOTIONS
TO DISQUALIFY ATTORNEY KOUTEN**

Defendant Kouten continues to appear at these hearings. Despite the filing of a fatally defective *Notice of Association*, Defendant Kouten appeared on behalf of all defendants in this action. He failed to file any written opposition to plaintiff's *Motion to Alter, Amend, Reconsider, and Vacate Order of May 8, 2013*.

He continues to act adversely to Alice Shaw Baker and her rights, therefore plaintiff respectfully asks this court to rule on her motions and disqualify Kouten due to his actual conflict and all other grounds stated.

IV.
REMEDY SOUGHT

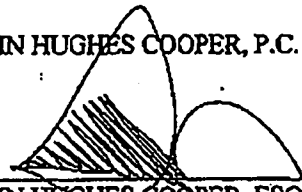
If this court fails to reverse its grant of summary judgment, its decision will result in the wholesale destruction of Alice Shaw Baker's claims, despite the well accepted public policies of the State of South Carolina for the protection of the elderly from abuse.

Alice Shaw Baker's life was a blessing to those who loved her. She lived a life devoted to animals. She took care to rescue and support animal rescues. The only individual willing to fight to recover for the true beneficiaries, animal charities, is plaintiff. Law in South Carolina as stated herein supports her position.

Plaintiff respectfully represents that this court has the authority and the mandate to ensure that the rights of Alice Shaw Baker, a vulnerable adult, are considered in this case, therefore justice demands reversal of Defendants' summary judgment motion.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

October 18, 2013

THE LAW OF TRUSTS AND TRUSTEES

**A Treatise Covering the Law Relating
to Trusts and Allied Subjects
Affecting Trust Creation
and Administration**

WITH FORMS

By

GEORGE GLEASON BOGERT

Late James Parker Hall Professor of Law,
University of Chicago Law School, and member of the Bar
in New York and Illinois

and

GEORGE TAYLOR BOGERT
of the Chicago Bar

REVISED SECOND EDITION

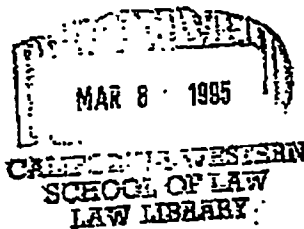
Sections 861-960

[Date Revised Second Edition Volume published: 1982]
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**ST. PAUL, MINN.
WEST PUBLISHING CO.
1995**

EXHIBIT

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§ 869

REMEDIES UNDER TRUSTS

Ch. 41

without joining the trustee.³³

If a contract is made between a third party and the beneficiary, by which benefits are to inure to the trustee as such, the beneficiary may enforce the contract if there is no obstacle arising out of third party beneficiary contract rules.³⁴

If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties. There is danger that the cause of action may be barred by laches or the operation of the Statute of Limitations, if the beneficiary is obliged to wait for the trustee to act, or is forced to sue the trustee to compel action, or to bring a proceeding for the removal of the trustee and the appointment of a successor. In addition the financial condition of the third party may change so that all relief will be shut off. In such an emergency the court permits a suit in equity by the beneficiary, to enforce the cause of

33. *Agot v. Agot's Cash Store No. 2*, 1824, 190 So. 809, 211 Ala. 422; *Chauhan v. Boughton*, 1890, 13 S.W. 877, 100 Mo. 408; *Potter v. Potter*, 1846, 3 Civ.Proc.R. (N.Y.) 150; *Bush v. Missouri State Life Insurance Co.*, 1922, 207 P. 317, 88 Ohl. 182.

Section 210, New York Civil Practice Act, authorizing a trustee of an express trust to sue in his own name, does not prevent a beneficiary from suing in an appropriate case. *Varga v. Credit Suisse*, 1967, 162 N.Y.S.2d 80, 8 Misc.2d 843, reversed on another point, 1958, 171 N.Y.S.2d 674, 5 A.D.2d 289, affirmed 182 N.Y.S.2d 17, 5 N.Y.2d 865, 155 N.E.2d 855.

The sole beneficiary of a retirement trust had the power to control the investments of the trust funds and therefore had standing to sue for alleged fraud in connection with a transaction whereby securities were purchased by the trust. As beneficiary he was the only person who was actually harmed and was thus a de facto buyer. *Gross v. Diversified Mortgage Investors, S.D.N.Y.* 1977, 431 F.Supp. 1080, affirmed C.A. 2, 1980, 636 F.2d 1201.

The beneficiaries of an express trust sued a real estate broker for breach of

his fiduciary duty in the sale of trust property. Under N.M. Code of Civil Procedure, Rule 17(a), the beneficiaries as the real parties in interest could properly maintain the suit even though title to the property was in the trustee. *Eliart v. Johnson*, 1966, 411 P.2d 228, 76 N.M. 745.

As the real beneficiaries under a trust agreement between the developer and bank as trustee whereby bank retained the subdivision's water supply in trust, plaintiffs could directly sue the developer and its transferee for damages by reason of developer's fraud in representing the subdivision had an adequate water supply. *Lincoln Land Co. v. Parkway*, 1973, 203 S.E.2d 597, 130 Ga.App. 407.

The trustee is not a necessary party to the action by the beneficiary against a third party. *Purdy v. Bank of America National Trust & Savings Association*, Cal.App. 1934, 32 P.2d 672, subsequent opinion 1935, 40 P.2d 481, 2 Cal.2d 238.

34. *Recknagel v. Steinway*, 1905, 94 N.Y.S. 119, 105 App.Div. 561, modified on other grounds, 1906, 77 N.E. 801, 164 N.Y. 614.

Ch. 41

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Ch. 41

BENEFICIARY AND TRUSTEE

§ 869

action running to the trustee, in which case the third-party and the trustee should be made parties defendant.³⁵ The beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary.³⁶

If the trustee refuses to bring the action, after demand,³⁷ or

35. *Cherry v. Howell*, C.A.2, 1833, 68 F.2d 713.

Relief should be sought by suit and not by petition. In re *Braverman*, 1934, 272 N.Y.S. 96, 242 App.Div. 834.

A beneficiary of a trust of shares in a corporation may sue the corporation to compel a declaration of dividends, when he proves that a demand on the corporation or the trustee of the stock would be futile. *Schlegel v. Schlegel Manufacturing Corp.*, 1965, 268 N.Y.S.2d 587, 23 A.D.2d 508.

36. Statutes in a few states give the beneficiary the right to enforce the cause of action under stated circumstances. See West's *Ann. Ind. Code* 30-4-3-21, as follows:

"30-4-3-21 [31-1631]. Remedies of the beneficiary against third persons.—If the trustee has a claim against a third person for which he may maintain a civil action under 30-4-3-15 but he is unable, unwilling or neglects to commence the action within a reasonable time not to exceed thirty (30) days after written demand, any beneficiary may commence the action in his own right for the benefit of all the beneficiaries."

And see *La.—LSA-R.S. 9:2222*, as follows:

"§ 2222. Remedies against third persons

"A trustee is the proper plaintiff to sue to enforce a right of the trust estate, except that a beneficiary may sue to enforce such a right, in order to protect his own interest, in an action against:

(1) A trustee and an obligor, if the trustee improperly refuses, neglects,

or is unable for any reason, to bring an action against the obligor; or

(2) An obligor, if there is no trustee or the trustee cannot be subjected to the jurisdiction of the proper court."

37. *President and Trustees of Bowdoin College v. Merritt*, C.C.Cal.1893, 54 Fed. 65; *Alexander v. Central Railroad of Iowa*, 1874, Fed.Cas. No. 165, 8 Dill. 487; *Owens v. Ohio Central Railroad Co.*, C.C.W.Va.1884, 20 Fed. 10; *Reinach v. Atlantic & Great Western Railroad Co.*, C.C.Ohio 1893, 58 Fed. 33; *Blackburn v. Fitzgerald*, 1901, 30 So. 568, 130 Ala. 584 (annul); *Ragan v. Mahoney*, 1912, 174 P. 1119, 24 Colo.App. 285; *Canada v. Daniel*, 1913, 167 S.W. 1032, 175 Mo.App. 55; *De Kay v. Hackensack Water Co.*, 1884, 38 N.J.Eq. 153; *O'Bairne v. Allegheny & Kuzma Railroad Co.*, 1897, 45 N.E. 872, 151 N.Y. 372; *Anderson v. Daley*, 1899, 58 N.Y.S. 511, 38 App.Div. 506, appeal dismissed 53 N.E. 753, 158 N.Y. 148; *Phoebe v. Black*, 1877, 76 N.C. 378.

And see *Doggett v. Hart*, 1853, 5 Fla. 215, 58 Am.Dec. 464; *Wright v. Mack*, 1884, 95 Ind. 383; *Hall v. M.B. O'Reilly Realty & Investment Co.*, 1925, 287 S.W. 407, 308 Mo. 182; *Marshall's Estate*, 1892, 22 A. 24, 138 Pa. 285; *Fogg v. Middleton*, 1887, 2 Hill Eq. (11 S.C.) 591; *Hillings v. Aspen Mining & Smelting Co.*, C.C.A.8, 1892, 52 Fed. 250; *Gandy v. Gandy*, 1882, 30 Ch.Div. 67.

Where a trustee has sold stock belonging to the trust and the beneficiaries claim that he has not received the price in full, and he refuses to attempt to collect more from the buyer, the beneficiaries may sue the buyer to collect the excess due. *Moser v. Keller*, Mo.1957, 303 S.W.2d 135.

§ 869

REMEDIES UNDER TRUSTS

Ch. 41

fails to act,³³ or the trusteeship is vacant,³⁴ or the trustee has been absent for many years,³⁵ or the trustee has an adverse interest,³⁶ or

Where a trustee holds stock and refuses to bring a stockholder's action, the beneficiary as equitable owner of the stock may bring such action. In re Stewart's Estate, Sur.1837, 3 N.Y.S.2d 885, 167 Misc. 361.

Where a trustee owns a mortgage and refuses to sue to foreclose it, the beneficiaries may do so, joining the trustee as defendant. Brooklyn Free Kindergarten Society v. Eliran Realty Corp., 1938, 7 N.Y.S.2d 531, 256 App.Div. 852.

Beneficiaries can sue on behalf of the trustees to set aside a transaction which involved disloyalty, where the trustees refuse to do so. London v. Goodman, 1957, 162 N.Y.S.2d 972, 6 Misc.2d 277.

Where there is serious doubt as to the wisdom of a suit by a trustee against a third person, and the trustee takes advice of counsel and refuses to sue, and the beneficiary thereafter sues and recovers, making the trustee a party, the trustee can recover its counsel fees and is not liable for the counsel fees of the beneficiary or other losses resulting from delay in collection from the third party. In re Wanamaker's Trust, 1941, 17 A.2d 380, 340 Pa. 418.

Where trustees have leased trust property, and it is claimed by the beneficiaries that the leases were made in collusion with the lessees in order to enable the latter to make subleases at higher rates, and the trustees refuse to act against the tenants to recover these profits, the beneficiaries may sue the trustee and the third persons. Manley v. Brattleboro Trust Co., 1951, 78 A.2d 488, 118 Vt. 460, citing text (1st Ed.), §§ 870, 871.

As participants in a welfare fund for city employees plaintiffs sought the removal of the fund's trustees and the appointment of a receiver as well as damages. The court held that the fund was a trust rather than an unincorporated association; therefore suits on its be-

half need not be brought pursuant to statute in the name of an officer of the fund. However, as to one claim against the trust's insurers the complaint failed to allege with particularity the reasons for not making a demand on the trustees to bring suit on the claim. Insofar as plaintiffs sought to recover overcharges from the union that represented many of the participants, control of the trustees by the union excused demand on the trustees to sue the union. Veler v. Feinstein, 1982, 451 N.Y.S.2d 110, 87 A.D.2d 309, appeal dismissed in part, denied in part 454 N.Y.S.2d 1081, 57 N.Y.S.2d 605, 440 N.E.2d 1842.

33. Wheeler v. Brown, 1861, 28 Ill. 368; Hall v. Windsor Savings Bank, 1923, 181 A. 583, 124 A. 583, 97 Vt. 126; Fleming v. Holt, 1877, 12 W.Va. 143.

Where a tax collector is levying on the trust property to collect a tax due from the settlor of the trust, the beneficiary may sue to enjoin such action, if the trustee refuses or neglects to sue, but only in that event. Schweikler v. Manning, D.N.J.1949, 88 F.Supp. 964.

34. Howard v. Gilbert, 1869, 39 Ala. 723. But see Grady v. Thach, 1892, 10 So. 287, 84 Ala. 152; Burkhalter v. People's Bank, 1932, 155 S.W. 749, 178 Ga. 744; Zimmerman v. Malinspear, 1899, 62 N.E. 992, 151 Ind. 199; Judd v. Dike, 1883, 15 N.W. 872, 80 Minn. 380; Andrews v. Bousfield, 1847, 10 Beav. 511.

Where the trustee is deceased and no successor has been appointed, and trustees had released a mortgage belonging to the trust without consideration, the beneficiaries may sue the successors of the mortgagee to have the release declared void. Locke v. Andrusko, 1934, 34 P.2d 444, 178 Wash. 145.

40. Hemmerich v. Union Dime Savings Institution, 1911, 129 N.Y.S. 287, 144 App.Div. 413, affirmed, 1912, 88 N.E. 499, 205 N.Y. 366. And see Ampe-

41. See footnote 41 on page 121.

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Ch. 41

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Ch. 41

BENEFICIARY AND TRUSTEE

§ 869

has conspired to defeat the trust,⁴² or the trustee is held to be
estopped to sue the third party,⁴³ the beneficiary may bring the
action against the third person. The necessities of the case entitle
the beneficiary to proceed directly.⁴⁴

no *Mining Co. v. Fidelity Trust Co.*,
1909, 73 A. 249, 75 N.J.Eq. 555.

41. *Webb v. Vermont Central Rail-
road Co.*, C.C.Vt. 1881, 9 Fed. 785; *Hale*
v. Nashua & Lowell Railroad, 1890, 60
N.H. 533.

Where trustee wrongfully conveyed
trust funds to a bank of which he was
president, for the benefit of that bank,
and the bank was charged with notice of
such conversion, a cause of action arose
in favor of each beneficiary which did
not expire until the beneficiaries had
reached age and the time of the Statute
had run. Because of the hostility of the
trustee in the transaction the running of
the Statute against the trustee did not
bar the beneficiaries. *Happy v. Cole*
County Bank, 1936, 83 S.W.2d 570, 338
Mo. 1025.

General partners are bound in a fidu-
ciary relationship with their limited
partners. Where the general partners
would not sue to recover rent because
they were the persons who would be
liable for payment of the rent, the lim-
ited partners were permitted to initiate
the suit on behalf of the partnership.
Riviera Congress Associates v. Yansky,
1966, 277 N.Y.S.2d 385, 18 N.Y.2d 540,
223 N.E.2d 878.

Applicable state law did not prohibit
the maintenance of a derivative suit by a
limited partner against the general part-
ner for alleged breach of fiduciary duty
in the management of the partnership
affairs. The court cited the analogy to a
trust under which the beneficiary could
sue for the benefit of the trust where the
trustee had an adverse interest or had
conspired to defeat the trust. *Strain v.*
Seven Hills Associates, 1980, 429
N.Y.S.2d 424, 75 A.D.2d 360.

Where all the stock of a military acad-
emy corporation is held by the trust, and
it is alleged that a director and officer of

the corporation has been taking profits
on the sale of uniforms by the school to
the students, the beneficiaries of the
trust may sue for an accounting as to
such profits, when it is apparent that
the corporation will not sue. *Rowland*
v. Kahle, 1940, 6 S.E.2d 683, 174 Va.
343.

42. *Shivers v. Palmer*, 1863, 14 Ga.
342; *Wheeler v. Brown*, 1881, 28 Ill.
389; *Maldrum v. Scorer*, 1887, 58 L.T.R.
471.

Application of Grottinger, 1881, 440
N.Y.S.2d 189, 81 A.D.2d 263.

43. *Prather v. Weinsiger*, 1873, 10
Brash (73 Ky.) 117; *Bayless v. Elean*,
1860, 1 Cold. (41 Tenn.) 99.

Where a third party has recovered a
judgment against the trustee and threat-
ens to sell the trust property under em-
ption, the beneficiary may maintain a
suit to set aside such sale. It did not
appear that the trustee was a party or
had refused to bring the suit. *Kincaid*
v. Hensel, 1938, 55 P.2d 1060, 185
Wash. 503.

44. All trustees are not indispens-
able parties in a suit by employee mem-
bers of a union trust fund, and under
the circumstances showing neglect, de-
lay and refusal by the trustees, the
members need not have applied to the
trustees to bring suit before filing suit
themselves. *Booth v. Security Mutual*
Life Insurance Co., D.N.J. 1967, 155
F.Supp. 753.

In an action by a third party to set
aside a conveyance to the trustee as
fraudulent as against the creditors of
the settlor, the court should allow the
beneficiaries of the trust to intervene,
even if they are not necessary parties
and even if the trustee is attempting to
uphold the trust. The beneficiaries

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16/10/2013 13:53

(FAX)

P. 008/016

08/08/2009 11:20 FAX 8037547861

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Hyattsville, Beth

From: Hyattsville, Beth
To: Gloria, Debbie
Cc: Mark, John, Michael, Rachel, David, Nancy
Subject: RE: SC Debt Disposition 803-7547861
Attachments

Sent: Tue 4/7/2009 4:23 PM

Hi Caroline,

Here is the Bona info on the following page:

Printed: Key Personnel - Relationship - Disposition of Debt and Rescued - Generated By W01 2/2-08004
Caroline, I've attached this information on 2-72-09. I hope to see it again if you need the Bona info. Just let me know.

Take Care,
Beth

Beth Hyattsville
Office Coordinator
803 Deleted Disposition Plan
ING
200 Arbor Lane Drive, Suite 128
Chickadee, South Carolina 29225
803.754.7861 ext 2
803.754.7861 fax
Email: beth.hyattsville@ing.com
http://www.ing.com
W01, Your future, Made Possible.

From: Gloria, Debbie
Sent: Tue 4/7/2009 4:23 PM
To: Hyattsville, Beth
Cc: Mark, John, Michael, Rachel
Subject: RE: SC Debt Disposition 803-7547861

Hello,

Can you verify Bona disposition for SC part 803-7547861?

Thank!

Caroline Dizon
Plan Administrator
ING
1776 Midway Street
Lawson, MS 39240
Tel: 601-697-7800 Fax: 601-690-1800
Email: caroline.dizon@ing.com
W01, Your future, Made Possible.

<http://jammell.cblstraps.com/changes/HPHyattsville/Sent/620/Item/RE-720834209> 5/29/2009

ING 17

16/10/2013 13:53

(FAX)

P. 009/016

RCS105M1
Jul 22, 08

**** South Carolina Retirement Systems ****
- Maintain Contact Log -

RCS105PM
+ more >

Action: (D)

Name: ALICE E SHAW BAKER

BSN:

LISA FISHER

Phone :

CONSERVATOR FOR

ALICE E SHAW BAKER

PO BOX 91132

LONG BEACH CA 90808-1132

Reason : BENE PAYROLL

Start Time : 16:44:50

Call Length: 00:10:08

Call Date : 09-14-2004

CS Rep:

Dept: CS00

Last Updated by: RYARKL on: 08-14-2004

Notes :

ADV MEMBER THAT IF SHE CHANGES THE BENE AND THE ADDRESS F THE BENE IS A PO BOX THAT IS OKAY WITH US. ADV NO MONTHLY PAYMENTS DUE. HOWEVER AT HER DEATH CL TO BE PAID. SAID CURRENT BENE WORKS ON A DOG RESCUE AND THE MONEY TO GO TO THE DOG RESCUE ADV MAY WANT TO THE MAKE THE DOG RESCUE THE BENE THAT WAY SHE KNOWS FOR SURE IT WILL GO TO THE RESCUE

Direct Command:

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conf help retr quit prev next bkyrd fcard left right main
Contact log displayed successfully

EXHIBIT

C

SCRS 18

☐ Decedent has a right to take legal action in this county because:

4a: Names and addresses of devisees in the will including dates of birth of minors. If there are no minors, so state:

Name	Date of Birth	Address	Relationship to Decedent
Bessie Huckabee		401 S. Main St., N. Charleston, SC 29418	
Sandra Byrd		200 S. Main St., N. Charleston, SC 29418	
Kay Pascallague		100 S. Main St., N. Charleston, SC 29418	
(use additional sheet if necessary)			

- 4.b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minors. If there are no minors, so state. Intestate heirs are the persons who would inherit if the decedent left no will.

Name	Date of Birth	Address	Relationship to Decedent
Betty Fisher		P.O. Box 91112, Long Beach, CA 90809-1112	Niece
Brigida Soria		Unknown	Great Niece
Children of Tom Sasso		Unknown	
Children of Lucky Rose Sazo		Unknown	

(Use additional sheet if necessary).

5. • Did decedent have any change of marital status or the birth or adoption of any children after execution of the will, if one exists, or has any child of the decedent been born since his death, or is any birth of a child of the decedent anticipated? (This includes illegitimate children.)
☒ NO ☐ YES If yes, please explain on page 3.
6. • To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?
☒ NO ☐ YES If yes, please explain on page 3.
7. • Have a guardian or conservator ever been appointed for this person?
☐ NO ☒ YES If yes, please explain on page 3.
8. • Has a personal representative of the decedent been appointed prior to this date by a Court in this state or elsewhere?
☐ NO ☒ YES If yes, please state details, including name and address of such Personal Representative on page 3.
9. • Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?
☒ NO ☐ YES If yes, please state details, including names and addresses of such Personal Representative, on page 3.
10. • Have more than ten years passed since the decedent's death?
☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.
11. • The decedent died with a personal estate of about the value of \$200,000 and real estate of about the value of \$150,000. (A full inventory and appraisal, Form #350PO, must be filed within 90 days.) If decedent was non-resident, please attach South Carolina Certificate (Form ET-101).
12. • After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?
☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II.

II. IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the Decedent's Will

- ☐ The original is attached
☒ The original is in the Court's possession
☐ An authenticated copy of a will probated in another jurisdiction is attached
☐ An authenticated copy of a will not probated in another jurisdiction is attached
☐ The will is lost, destroyed, or otherwise unavailable, however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the will described above was validly executed?

- ☐ YES ☒ NO If no, please explain on page 3:

3. The date of execution of this will was: May 21, 2001

codicil(s): Unknown

4. Are you aware of any instrument or document purporting to revoke this will?

- ☐ NO ☒ YES: If yes, please explain on page 3:

5. Have you exercised reasonable diligence in determining there is no instrument or document revoking the will?

- ☐ YES ☒ NO If no, please explain on page 3:

6. Do you believe the will defined in #1 above is the decedent's last will?

- ☐ YES ☒ NO If no, please explain on page 3:

COMPLETE EXPLANATION(S) FOR QUESTIONS IN SECTIONS I and II HERE:

(If more space is required, use additional sheet.)

4.b. Darlene George Shouse. Address Unknown

7. • Alice Shaw Baker's great niece, Lisa Fisher, was appointed as guardian and conservator October 29, 2008 in Case No. 2008-GC-10-088 Van M.L. Shaw-Bakers consent.

8. • On March 10, 2009, Bessie Huchabee was appointed as Personal Representative in Case No. 2008-ES-10-0378. Her address is [redacted] Street, North Charleston, SC 29418.

Section II

For explanations for Questions 2, 4, 5, and 6, please the Addendum to Petition for Formal Testacy and Appointment.

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING:

1. The name(s) and address(es) of the proposed Personal Representative(s) is/are:
Betty Fisher

2. Priority for this appointment is:
 - ☐ named as Primary Personal Representative in will or nominee of Primary Personal Representative
 - ☐ named as Alternate Personal Representative in will or nominee of Alternate Personal Representative
 - ☐ named as nominee of Primary and/or Alternate Personal Representative
 - ☐ other devisee of decedent, or nominee (describe): _____ or nominee of said devisee
 - ☐ surviving spouse of decedent, or nominee of said spouse
 - ☒ other heir of decedent (describe): Niece
 - ☐ creditor (Forty-five days after death must have passed), or nominee of creditor
 - ☐ other (describe): _____
 - ☐ nominee of any of the above
3. List below the names of any other persons, if any, having a prior or equal right of appointment (see priority above):

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief, and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this _____ day of _____, 20____.

See attached

Signature: Betty Fisher
 Name: Betty Fisher
 Address: PO Box 91112
Long Beach, CA 90809-1112
 Email: _____
 Telephone (0): _____
 DT: _____

Notary Public for South Carolina
 My Commission Expires: _____

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be ☐ GRANTED ☐ DENIED informally this _____ day of _____, 20____.

 Probate Court Judge

JURAT

STATE OF CALIFORNIA
COUNTY OF LOS Angeles

Subscribed and sworn to (or affirmed) before me on
this 31 day of March, 20 09
by Betty Sazio Fisher

proved to me on the basis of satisfactory evidence to be the person(s) who
appeared before me.



NOTARY PUBLIC
COUNTY OF LOS ANGELES
My Comm. Expires
03/31/2011

Signature [Handwritten Signature]

(seal)

ORDER FOR HEARING ON FORMAL PETITION

IT IS HEREBY ORDERED that a hearing on this matter be set for:

DATE: _____

TIME: _____

PLACE: _____

Pursuant to Section 62-1-401, the petitioner is ordered to give notice of this hearing to all interested persons at least twenty (20) days prior to the hearing.

Executed this _____ day of _____, 20____

Probate Court Judge**ORDER OF FORMAL TESTACY**

On hearing of the above petition, the Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.

The Court further finds that:

☐ the decedent died intestate. The heirs are:☐ the decedent died testate. IT IS HEREBY ORDERED that the Last Will and Testament of the above-named decedent dated _____ be admitted formally to probate.

Executed this _____ day of _____, 20____

Probate Court Judge

SEE ATTACHED ORDER

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application/petition for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this _____ day of _____, 20____

Probate Court Judge

FORM 605FC (2004)

Page 5 of 8

FORM 605FC (2004)

Page 6 of 6

2012-CP-10-1332

FILED

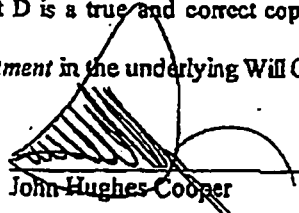
OCT 18 2013

AFFIDAVIT OF JOHN HUGHES COOPER JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

PERSONALLY APPEARED, JOHN HUGHES COOPER, who, first being duly sworn,
deposes and says:

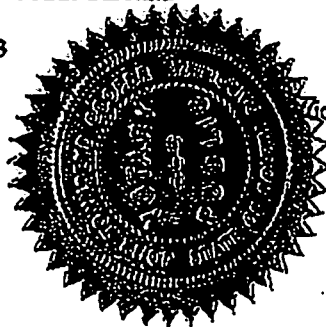
1. My name is John Hughes Cooper.
2. I am a citizen of the United States, over 18 years of age, and of sound mind. I am local counsel for Plaintiff Betty Fisher and in her capacity as Petitioner in the underlying Will Contest. The sources of my information and the grounds for my beliefs herein are my personal knowledge and the documents in my possession.
3. Attached hereto are true and correct copies of the pertinent pages of Bogert, The Law of Trust and Trustees, § 869, ch. 41, "Beneficiary and Trustee-Remedies under Trusts", p. 118-119 marked as Exhibit A.
4. Attached hereto are true and correct copies of pages of discovery from the Will contest suit to this supplement for the court's consideration marked as Exhibit B, ING 16-17.
5. Attached hereto is a true and correct copy of correspondence regarding the death benefits of the South Carolina Retirement System marked as Exhibit C, SCRS 18.
6. Attached hereto as Exhibit D is a true and correct copy of the Clocked copy of *Petition for Formal Testacy and Appointment* in the underlying Will Contest matter, 2009-ES-10-0378.

Further affiant sayeth naught.


John Hughes Cooper

Mount Pleasant, South Carolina

October 18, 2013



SWORN TO AND SUBSCRIBED
BEFORE ME THIS 18th DAY OF
OCTOBER, 2013

NOTARY PUBLIC FOR SOUTH
CAROLINA; MY COMMISSION
EXPIRES: 3-4-2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker,

Plaintiff,

v.

BESSIE HUCKABEE et al

Defendants,

PLAINTIFF BETTY FISHER'S
NOTICE OF MOTION AND MOTION TO
STRIKE:

- 1) DEFENDANTS' LATE
MEMORANDUM RE. SUMMARY
JUDGMENT;
- 2) ORDER SUBSTITUTING COUNSEL

AFFIDAVIT OF JOHN HUGHES COOPER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Betty Fisher, Real Representative for Alice Shaw Baker ("Plaintiff"), by and through her undersigned counsel, will, within 10 days following service of this motion or as soon thereafter as they may be heard, respectfully move this Court for an Order striking Defendants' *Supplemental Memorandum Denying Plaintiff's Motion Reconsidering Summary Judgment* filed on October 22, 2013 and the *Consent Order for Substitution of Counsel* filed on October 14, 2013 in this matter. The grounds for the motion are set forth herein:

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I.

INTRODUCTION

Plaintiff has filed this motion to strike to maintain the integrity of these proceedings, ensure that due process is protected, and to inform this court of facts related to the improper service by Defendants of the *Order for Substitution of Counsel* and the late filing of the Supplemental Memorandum on plaintiff's motion to alter, amend, etc.

This court is justified in striking the Supplemental Memorandum of Defendants and the *Order Appointing Counsel*.

II.

STATEMENT OF FACTS

Plaintiff Betty Fisher filed this action as real representative of Alice Shaw Baker, as a survival action for Alice Shaw Baker's rights. She asserted 4 causes of actions: 1) Violation of Omnibus Adult Protection Act as to all Defendants; 2) Breach of Fiduciary Duty as to all Defendants; 3) Legal Malpractice as to Defendant Kouten; 4) Attorney Fees and Costs. The action was filed on or about February 24, 2012.

On or about July 16, 2012, a motion for Summary Judgment/motion to dismiss was brought. It failed to address all causes of action, and it was brought in the name of Respondents—not defendants. It was verified by Defendants Huckabee, Slade, and Byrd, but there were no affidavits attached to said motion. Defendant Kouten did not verify it, nor did he address the allegations against him.

Plaintiff opposed said motion.¹ She filed expert declarations on the issues of Violations of Omnibus Act/abuse and breach of fiduciary duty and legal malpractice. She filed witness declarations as well.

¹ Plaintiff filed a *Motion for Disqualification* against Attorney Kouten on or about August 8, 2012. This has not yet been ruled on. Plaintiff requests the court's ruling.

On or about May 7, 2013, this court granted Summary Judgment.²

On or about May 28, 2013, Plaintiff timely filed a *Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013* ("Motion to Alter").

At the hearing on the Motion to Alter, the court entertained argument. The court noted that the grant of summary judgment would foreclose Alice Shaw Baker's rights to recover. Thereafter, the court requested *Supplemental* briefing on the matter to be filed within 10 days. Plaintiff's counsel, Lisa Fisher, reiterated the time on the record to ensure accuracy for filing of the briefing.

On or about October 18, 2013, Plaintiff filed her *Supplemental Brief re: Motion by Plaintiff Betty Fisher to Alter, Amend, Reconsider and Vacate Order of May 8, 2013; Memorandum; Affidavit of John Hughes Cooper*. ("Supplemental Brief")

Prior to filing of any supplemental briefing by Defendant Kouten, Defendants filed a *Consent Order for Substitution of Counsel* on October 14, 2013 ("Order for Substitution"). The certificate of service stated that it had been previously served on plaintiff's counsel by Mail and email. Plaintiff did not discover the filing until review of the docket and receipt of judgment from the Clerk of the court. Said *Order for Substitution* stated that:

"Peter Kouten is hereby relieved as counsel of record in the above-captioned matter, and W. Westbrook Wills III...shall be sole counsel of record for Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailague."

On or about October 22, 2013, Defendant Kouten filed his *Supplemental Memorandum Denying Plaintiff's Motion Reconsidering Summary Judgment* ("Supplemental Memo of Kouten"). In said pleading, he references "defendants" in the Section entitled Question Presented, section 1, p. 1, therefore

² The Form 4c Judgment referenced "plaintiff's motion for summary judgment", however plaintiff did not bring the motion. This court amended its order and clarified it was for "defendants".

suggesting that the briefing is as to all Defendants. Nowhere in the briefing does he inform the court that he no longer represents the defendants. Further, the Supplemental Memo of Kouten states that it was served on October 18, 2013. (Attached hereto is a true and correct copy of said document marked as Exhibit A which says it was served on October 18, 2013 in the certificate of service, but which shows it was not served or filed until October 22, 2013.)³

Additionally, during this same period of time, Defendant Kouten sent out discovery on behalf of Huckabee for the Estate despite filing the *Order for Substitution*.⁴ (Attached hereto is a true and correct copy of said discovery marked as Exhibit C.) Further, he served this discovery despite the matter being on appeal in the circuit court, the pending removal action of Huckabee, and her failure to satisfy a court order for a bond to act⁵ (had there not been the stay and removal actions).

Plaintiff does not waive her objections. She brings this to the court's attention, with the argument that Defendants are committing a fraud on the court by the filing of the initial *Order for Substitution*. The order was obtained without consent of plaintiff and without notice pursuant to Rule 5, SCRCP. Plaintiff asserts that this filing is done to lull this court into the belief that the *Motion for Disqualification* is not still pending. As set forth here, a ruling on the *Motion for Disqualification* still is necessary to protect the rights of Alice Shaw Baker.

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³ While it lists Lisa Fisher, Esquire on the service list, she was only received a copy of said notice by way of local counsel. She is filing concurrently a *Notice of Address, etc.* to ensure that she receives copies of all correspondence.

⁴ Attached hereto is a true and correct copy of the *Consent Order for Substitution of Counsel* which states that plaintiff's counsel was served with this document by both mail and email marked as Exhibit B. No such Order was received. (See Affidavit of John Hughes Cooper)

⁵ See S.C. Code Ann. § 62-3-605; S.C. Code Ann. Section 8-3-60 [unlawful for individual to take public office without bond where required].

III.

LEGAL AUTHORITY

Rule 12(f), SCRCP provides in pertinent part that a pleading may be stricken pursuant to a motion to strike, as follows:

" Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." (Emphasis added)

Here, Defendant Kouten's pleading fails on two fronts: 1) It is tardy despite strict instructions related to the filing of the brief; and 2) said supplement was filed without legal authority since he was not counsel of record. This was aggravated by the failure to serve plaintiff with the Order for Substitution in violation of due process and Rule 5, SCRCP.

As explained above, The Order Substituting counsel was not served as stated in the *Certificate of Service*. Neither Plaintiff's counsel John Hughes Cooper, Esquire or John Townsend Cooper, Esquire received a copy by mail or by email. Lisa Fisher, Esquire did not receive a copy, despite the representation on the mailing list. Plaintiff did not discover the filing until review of the docket and receipt of judgment from the Clerk of the court.

This order is a "void judgment [which] is one that, from its inception, is a complete nullity and is without legal effect[.]" *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)."

Plaintiff respectfully requests that the court strike said Supplemental Memo for all the reasons stated herein.

IV.

CONCLUSION

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1944), the United States Supreme Court explained why acts constituting a "fraud on the court" are so devastating, in light of the fact that it:

"...is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

This is a continuing problem: first, with Attorney Kouten, now again perpetuated by Attorney Wills.⁶ It may seem simple. They merely failed to serve plaintiff with the order appointing Wills as counsel, but it was done with knowledge that plaintiff had already objected to their failure to abide by the rules in substituting counsel. Thereafter, the situation was aggravated by the filing of the Supplemental Memo of Kouten late, contrary to this court's order and after reading plaintiff's Supplemental Briefing. If this is not enough, the final straw is that Attorney Kouten filed his Supplemental Memo without informing this court that he had obtained an order which stated:

"...W. Westbrook Wills III...shall be sole counsel of record for Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailague." (See Ex. B)

His attempt to avoid detection by this court exacerbated this wrongdoing by his failure to reference Defendants Huckabee, Slade, and Byrd at the beginning of the Supplemental Memo of Kouten, knowing that the filing of the Memo implied it was on behalf of all Defendants, when he was

⁶ Attorney Kouten admitted to previous ex parte contact with the courts in obtaining an order on June 9, 2009 order. (See *Brown v. Bi-Lo, Inc.*, 354 S.C. 426, 440 n.3, 581 S.E.2d 836, 838 n.3 (2003) (An Ex parte communication consists of "prohibited communication between counsel and the court when opposing counsel is not present.")). Here, he again obtains an order with ex parte communications.

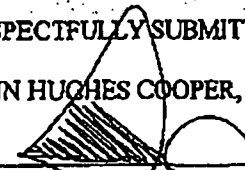
without legal authority to file it on their behalf. His acts also gave the impression that these other defendants (i.e. Huckabee, Slade, and Byrd) *had* filed a supplemental memo when they had not.

These improper actions have been going on since the beginning of *this* case, *and* the underlying Will contest, causing plaintiff to incur unnecessary fees and frustration. She filed this action to protect Alice Shaw Baker's rights—all necessitated by Attorney Kouten's continued improper representation of the adverse interests of defendants. It is a sad day when a court appointed guardian ad litem, visitor, and attorney puts everyone else before his sworn duty to protect the interests of an individual adjudicated incompetent. This demands a ruling on plaintiff's *Motion for Disqualification*.

Plaintiff reminds this court of Alice Shaw Baker's interest. She matters under the law. She matters as a citizen of the State of South Carolina. And finally, she matters because she was greatly loved by her niece, plaintiff Betty Fisher, who has spent this time in litigation to vindicate the desires of Alice's, that her monies be bequeathed to animal charities.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

PO Box 91112

Long Beach, CA 90809-1112

843-883-9099; fax 843-883-9335

lfisher6736@yahoo.com

ATTORNEYS FOR PLAINTIFF

October 29, 2013

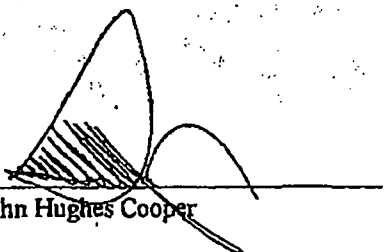
AFFIDAVIT OF JOHN HUGHES COOPER

PERSONALLY APPEARED, JOHN HUGHES COOPER, who, first being duly sworn,
deposes and says:

1. My name is John Hughes Cooper.
2. I am a citizen of the United States, over 18 years of age, and of sound mind. I am local counsel for Plaintiff Betty Fisher and in her capacity as Petitioner in this matter and in underlying Will Contest.
3. The sources of my information and the grounds for my beliefs herein are my personal knowledge and the documents in my possession.
4. On or about October 22, 2013, Defendant Kouten filed his *Supplemental Memorandum Denying Plaintiff's Motion Reconsidering Summary Judgment* ("Supplemental Memo of Kouten"). This was 4 days after the court's deadline for filing any supplement. The Supplemental Memo of Kouten states that it was served on October 18, 2013. (Attached hereto is a true and correct copy of said document marked as Exhibit A which says it was served on October 18, 2013 in the certificate of service). The envelope shows that it was not filed or served until October 22, 2013.
5. Attached hereto is a true and correct copy of the *Consent Order for Substitution of Counsel* which states that we were served with this document by both mail and email marked as Exhibit B. I received no copy of said Order, nor did anyone in my office receive any copy of said order by mail or email.

6. Attached hereto is discovery received from Attorney Kouten on behalf of Huckabee for the Estate despite filing the *Consent Order for Substitution of Counsel*. (Attached hereto is a true and correct copy of said discovery marked as Exhibit C.)
7. The discovery was served in a matter stayed on appeal. Additionally, our will contest action includes a cause of action for the removal of Huckabee. Also, Judge Hughston had previously ordered her to get a bond, which has never been filed.

Further affiant sayeth naught.


John Hughes Cooper

Mount Pleasant, South Carolina

October 29, 2013

Sworn to and Subscribed
Before me this 29th Day
Of October, 2013.


Notary Public for South
Carolina; My Commission
Expires: 3-4-2021



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Betty Fisher,)
Plaintiff,)
v.)
Bessie Huckabee, etal,)
Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-1332

**SUPPLEMENTAL MEMORANDUM
DENYING PLAINTIFF'S MOTION
RECONSIDERING SUMMARY JUDGMENT**

FILED
2013 OCT 22 AM 9:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

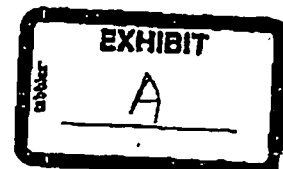
COMES NOW the Defendant in the above action, asking that the Court uphold the Order Granting Defendant's Motion for Summary Judgment. Peter A. Koufen, as Defendant in the present action, upon request of the Court, herein provides supplemental memorandum in Support of upholding the Court's Order Granting Defendant's Motion for Summary Judgment.

HISTORY

1. Alice Shaw-Baker died February 25, 2009.
2. An estate was opened in the Charleston County Probate County within thirty days of her passing.
3. Plaintiffs delivered the Last Will and Testament to the Charleston County Probate Court and the personal representative nominated in the Last Will was appointed.
4. Plaintiffs filed contest of Last Will and Removal of Personal Representative in complaint filed in April 27, 2009.
5. Plaintiffs have not sought hearing on the contest of Last Will nor have they pressed for hearing on the Removal of Personal Representative.
6. Plaintiffs filed the action at bar on February 24, 2012 under Charleston County Circuit Court file number 2012-CP-10-1332.
7. Four years has passed since filing the original complaint and Plaintiffs have not perfected any standing in matters affecting them as parties of interest.

QUESTIONS PRESENTED

- I. The Circuit Court should uphold the Order Granting Summary Judgment to the Defendants based on the following:
 - A. Do the Plaintiffs lack standing to bring any actions on behalf of the estate?
 - B. Does the circuit court have jurisdiction over matters seeking redress under the Omnibus Adult Protection Act?



DISCUSSION I.

A. Do the Plaintiffs lack standing to bring any actions on behalf of the estate?

Yes, Plaintiff lacks standing. South Carolina Probate Code specifically designates who shall have standing to bring actions on behalf of an estate. The South Carolina Probate Code places upon the personal representative of a decedent's estate standing to sue on behalf of the decedent. South Carolina Probate Code Ann. Section 62-3-703 Further, a personal representative is granted the authority to prosecute estate claims. South Carolina Probate Code Section 62-3-715(20) The South Carolina Probate Code grants standing to sue on behalf of a decedent to the court-appointed personal representative. These statutes provide certainty to anyone who has dealings with the estate that authority is centralized, without question, in the appointed representative.

Additionally, the wrongful death statute does not alter authority in this matter. Any and all causes of action for wrongful death shall survive against her personal representative. The wrongful death statute is clear in identifying those who may bring an action for wrongful death. The action is to be brought by or in the name of the executor or administrator without exception. South Carolina Code of Laws 15-51-10-20

The Plaintiffs have had over four years of opportunity to seek adjudication as to their action seeking determination of validity of the decedent's Last Will and Testament. The Plaintiffs have had over four years of opportunity to seek adjudication as to their action seeking the removal of the court-appointed personal representative. The Plaintiffs have failed to perfect any would-be standing in the estate of Alice Shaw-Baker. For these reasons, the Court should uphold the Order Granting Summary Judgment to Defendant.

B. Does the Circuit Court have jurisdiction over actions seeking redress under the Omnibus Adult Protection Act?

No, the Circuit Court lacks jurisdiction under the Omnibus Adult Protection Act. The family court has exclusive jurisdiction to seek protection of the alleged vulnerable adult under The Act. A hearing must be held within forty days of the petition being filed in the *family court*. The sole purpose of The Act is to identify vulnerable adults who are subject to abuse and, if found, immediately acting to remove said vulnerable adult from the abusive situation. The requirement is immediate, while the alleged vulnerable adult is allegedly being abused, not several years after her death. This Court lack jurisdiction as the family court is the proper trier of facts under The Act and therefore, Defendant's Grant of Summary Judgment should be upheld.

The Omnibus Adult Protection Act explicitly and procedurally requires a report to be filed within two days of the allegations of abuse, neglect, or exploitation and any actions, petitions and hearings to follow the report must proceed in the family court. The Plaintiffs in this action have filed no reports and have offered no specific instances of abuse, neglect, or exploitation of a vulnerable adult. This Court does not have jurisdiction over the procedure of seeking redress under the Omnibus Adult Protection Act. South Carolina Code Ann. Section 43-35-25 at seq.

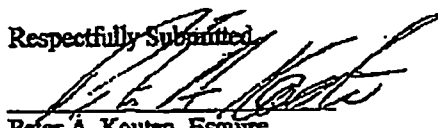
It is important to distinguish that, here, the Plaintiffs did not bring an action for wrongful death. The Plaintiff's statutory limit to file wrongful death action(s) has run. The Plaintiffs action is brought solely under the Omnibus Adult Protection Act. Under the Act, with proper authentication of facts and a contemporaneous report of abuse, the Plaintiffs would have every privilege under the laws of South Carolina to report any incident of alleged elder abuse.

Plaintiffs have never provided any contemporaneous report of abuse and therefore, Defendant's

Grant of Summary Judgment should be upheld.

WHEREFORE, Defendant respectfully requests that this Honorable Court uphold Grant of Defendant's Summary Judgment.

Respectfully Submitted,

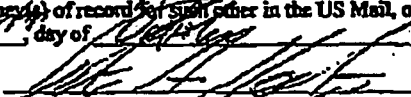

Peter A. Kouten, Esquire
P.O. Box 340
Johns Island, S.C. 29457
Office: (843) 670-3919
Fax: (843) 559-3162
pkouten@gmail.com

Charleston, South Carolina
 18, 2013.

Counsel served: John T. Cooper, Esquire
John H. Cooper, Esquire
Cain Denny, Esquire
Lisa Fisher, Esquire

CERTIFICATE OF SERVICE

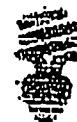
The undersigned certifies that the pleading to which this certificate is affixed was served upon the Party(s) to this action by depositing a copy of the same, enclosed in a first class, postpaid envelope properly addressed to the attorney(s) of record for said party in the US Mail, on this, 18 day of October, 2013.



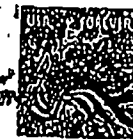
Kouten Law Firm, LLC
P.O. Box 340
Johns Island, SC 29457

CHARLESTON SC 294

22 OCT 2013 PM 2 J

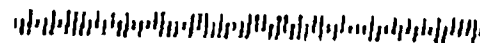


EVERETT



Lisa Fisher, Esq.
John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
Caine Denny, Esquire
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, SC 29464

29464+4587



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

BETTY FISHER and LISA FISHER,

Plaintiff,

v.

BESSIE HUCKABEE, et al.,

Defendants.

In the Matter of the Estate of
Alice Shaw-Baker.
Charleston County Probate
No.: 2009-ES-10-0378

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NOS.: 09-CP-10-3010 and
(12-CP-10-1332)

CONSENT ORDER
FOR SUBSTITUTION OF
COUNSEL

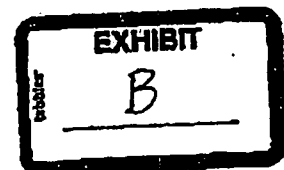
2013 OCT 14 PM 1:04
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

THIS MATTER is before this Court upon the joint motion of Peter Kouten of the Kouten Law Firm, LL and W. Westbrook Wills III, as evidenced by their signatures below, who request that the Court substitute Mr. Wills as counsel of record for the Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailaigue in the above styled case and relieving Peter Kouten as counsel for same Defendants. Based on the foregoing, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that W. Westbrook Wills III is hereby SUBSTITUTED as counsel of record for Defendants in place of Peter Kouten. Peter Kouten is hereby relieved as counsel of record in the above-captioned matter, and W. Westbrook Wills III, of the Law Office of W. Westbrook Wills

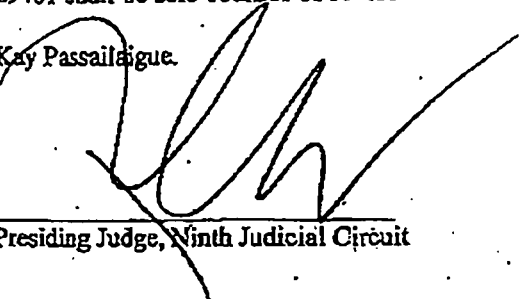
R



III, 38 Broad Street, Suite 200, Charleston, SC 29401 shall be sole counsel of record for
Defendants Bessie Huckabee, Sandra Byrd, and Kay Passailigue.

AND SO IT IS ORDERED.

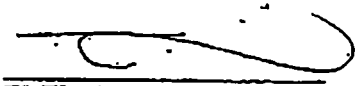
October 16, 2013
St. George, South Carolina


Presiding Judge, Ninth Judicial Circuit

WE SO MOVE:


Peter Kouten
The Kouten Law Firm LLC
P.O. Box 340a
Johns Island, SC 29457
pkouten@gmail.com

WE CONSENT:


W. Westbrook Wills III
38 Broad Street, Suite 200
Charleston, SC 29401
Tel: 843.805.6300
wwills@wwillslaw.com

CHARLESTON, SC
October 28, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT
COMMITMENT DIVISION
CASE NO: 2008-GC-10-088

In the Conservatorship of)
ALICE SHAW-BAKER,)
Deceased.)
Lisa Fisher, Conservator,)
Respondent.)

PERSONAL REPRESENTATIVE
BESSIE HUCKABEE'S
FIRST SET OF INTERROGATORIES
TO RESPONDENT LISA FISHER.

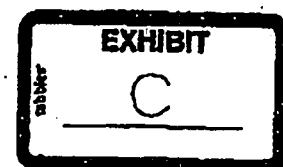
TO: Respondent Lisa Fisher

Bessie Huckabee, as court-appointed Personal Representative for the Estate of Alice Shaw-Baker serves and requests, pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, from Respondent Lisa Fisher, full and complete written answers to the following interrogatories.

INSTRUCTIONS

A. Where the following interrogatories request you to identify a person, firm, association, company, or corporation, please identify them by stating the full name and last known address of the person, firm, association, company, or corporation and phone number.

B. Where the following interrogatories request you to identify a document, this term means all original writings of any nature whatsoever and all non-identical copies in your possession, custody, or control or in the possession, custody, or control of your attorney as well as other documents of which you and your attorney have knowledge and includes, but is not limited to, correspondence, diagrams, data processing, storage units, tapes, photographs, contracts, invoices, receipts, bills, orders, notes, computer data, e-mails, and other written communications, and other documents as identified in Rule 34 of the South Carolina Rules of Civil Procedure. In all cases where the original and/or non-identical copies are unavailable, "document" also means copy.



C. Where the following interrogatories request you to identify a writing, recording, photograph, or other type of document, please state for each such writing, recording, photograph, or other document:

1. Its date;
2. The name, address, and representative capacity, if any, of each person, writing, recording, photographing, making, or signing it;
3. Its subject matter, and
4. The name, address, and representative capacity, if any, of each person in whose custody it is now being kept or to whose control it is subject.

D. In the event that any document or thing called for in any of these requests has been destroyed, lost, discarded or otherwise disposed of, identify as completely as possible, each document or thing, including without limitation, the following information: date of disposal, place and manner of disposal; reason for disposal; person authorizing the disposal; and persons disposing of the document or thing.

INTERROGATORIES

1. Please state your complete name, age, address, email address, occupation, and current employer.
2. Identify all persons from whom written or recorded statements have been procured relating to any of the matters at issue regarding conservatorship accountings filed by you or on your behalf, your requests for approval of conservator fees and expenses and your appeal to the Court's Order appointing a Special Fiduciary in this matter.
3. Identify every person, firm, association, company or corporation with whom you or your attorney have contacted relating to any matters at issue in this lawsuit, if any, and for

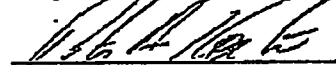
each, state the date and identify every writing or other document that evidences these contacts.

4. Please provide your social security number and phone number(s).
5. Please provide your California Bar number, and complete address, contact information and phone number for the California Supreme Court.
6. Please provide a detailed family tree indicating your relationship to Alice Shaw-Baker.
7. Please provide documentary evidence indicating that you are related to Alice Shaw-Baker and explain that relationship.
8. Please provide a list and description of any physical or mental illness or diagnosis suffered by you at present or at any time in the past including any hospitalizations, outpatient treatment, psychiatric evaluations or consultations, injuries, accidents, medical procedures or any information related to your medical history and condition.
9. Please describe the exact nature of your law business including the types of law practiced, estimate of open cases and number of hours worked per week.
10. Please indicate your hourly rate and provide documentary evidence of same.
11. Please provide your annual income for the years 2008 through 2013.
12. Please explain how you came into possession of the Last Will and Testament of Alice Shaw-Baker which was delivered to the Charleston County Probate Court Estate Division by you or on your behalf.
13. Please explain how the Last Will and Testament of Alice Shaw-Baker was provided to the Conservatorship Division of the Charleston County Probate Court.
14. Please explain how the Last Will and Testament of Alice Shaw-Baker was provided to the Estate Division of the Charleston County Probate Court at the time of Alice's death.

15. Please explain why, after seeking discharge of Conservator and after filing your final accounting as Conservator, you continued to act as Conservator and spend money from the conservatorship account.
16. Please explain why you do not recognize the authority of Bessie Huckabee as Personal Representative of the Estate of Alice Shaw-Baker.
17. Please explain whether the Court has approved any of your fees presented as Conservator for Alice Shaw-Baker and provide indication that any such fees have been approved by way of Court Order.
18. Please indicate whether, as Conservator, it was your understanding, based on your order of appointment, whether funds from the conservatorship could be spent for conservatorship or legal fees without prior approval and order from the Charleston County Probate Court.
19. Please explain your objection to the accounting filed by the Personal Representative in the Estate of Alice Shaw-Baker.
20. Please provide the names, addresses, and phone numbers of any attorneys retained by you in this or any related matter.
21. Please explain whether any legal fees have been paid to local counsel or to you as conservator from the conservatorship account of Alice Shaw-Baker and provide copies of any checks written to conservator or local counsel for conservator.
22. Please identify all persons involved in answering these interrogatories and include information as to who provided specific answers to interrogatory.

These interrogatories shall be deemed continuing so as to require supplemental answers if the persons to whom these interrogatories are addressed obtain further information between the time the answers are served and the time of trial.

Respectfully Submitted,



Peter A. Kouten, Esquire

Kouten Law Firm, LLC

PO Box 340

Johns Island, SC 29457

Attorney for Bessie Huckabee as Personal
Representative for the Estate of Alice Shaw
Baker

Charleston, South Carolina

October 15, 2013.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT
COMMITMENT DIVISION
CASE NO: 2008-GC-10-088

In the Conservatorship of)
ALICE SHAW-BAKER,)
Deceased,)
Lisa Fisher, Conservator,)
Respondent)

PERSONAL REPRESENTATIVE
BESSIE HUCKABEE'S
FIRST SET OF REQUESTS TO PRODUCE
TO RESPONDENT LISA FISHER.

TO: Respondent Lisa Fisher

Bessie Huckabee, as court-appointed Personal Representative for the Estate of Alice Shaw-Baker serves, pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, her First Set of Requests to Produce on the Respondent, directing her to furnish for production and copying the documents and files listed.

DOCUMENTS TO BE PRODUCED

You are requested to produce the original and any non-identical copies of the following:

1. Please produce all documents pertaining to assets held by Family Services, Inc. as initial temporary third party Conservator for Alice Shaw-Baker which were turned over to you as permanent Conservator.
2. Please produce initial bank statements indicating accounts opened by you as Conservator for Alice Shaw-Baker.
3. Please list all banks in which assets in the name of Alice Shaw-Baker and/or the Conservatorship of Alice Shaw-Baker are held including name of bank, address of branch bank, account number of each account, and phone number for branch bank representative.

4. Please provide all bank statements, receipts and checks written by you as Conservator to justify all receipts and disbursements for initial accounting filed by you upon your appointment as Conservator of Alice Shaw-Baker in 2008.
5. Please produce all bank statements, receipts and checks detailing expenses for all accounts in the name of Alice Shaw-Baker or the Conservatorship of Alice Shaw-Baker from the date of your appointment through the date of your discharge as conservator.
6. Please produce all bank statements and checks for all accounts in the name of Alice Shaw-Baker or the Alice Shaw-Baker Conservatorship from the date of your discharge through October 2013 or the most recent bank statement.
7. Please provide detailed list of caregivers including listing of payments to each caregiver as listed as disbursements in your final conservatorship annual accounting filed on May 26, 2009.
8. Please list itemized household expenses as listed as disbursements in your final conservatorship annual accounting filed on May 26, 2009.
9. Please list itemized administrative costs as listed as disbursements in your final conservatorship annual accounting filed on May 26, 2009.
10. Please list itemized listing of donations, itemized listing of medical expenses, itemized listing of final expenses as listed as disbursements in your final conservatorship annual accounting filed May 26, 2009.
11. Please provide all checks, receipts, and documentation evidencing line item expenses as listed in your disbursements on your amended conservatorship annual accounting filed June 1, 2011 covering the period 12/23/2008 through 12/31/2009 to include caregivers,

household expenses, administrative/legal fees, bills/credit, donations, medical, funeral services/final, bank charges, transfers to bank account, insurance, and taxes.

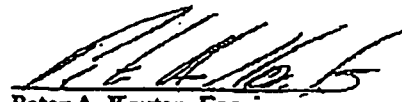
12. Please provide photo copies of bonds procured by you upon your appointment as Conservator for Alice Shaw-Baker and all bond renewal certificates.

13. Please provide list of personal property being stored at the house of Alice Shaw-Baker.

14. Please provide listing of eight (8) pieces of jewelry in your possession with photos of said jewelry and any appraisal that you have in hand for said jewelry.

15. Please provide list of all coins inventoried by you or your attorney that were in Alice Shaw-Baker's house and described by the temporary guardian, you or your counsel and provide photo's of same.

Please be advised that this Request to Produce is continuing and that this discovery request includes providing each additional bank statement received by you in the future in said accounts pursuant to South Carolina Rules of Civil Procedure Rule 26(e).



Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
Attorney for Bessie Huckabee as Personal
Representative for the Estate of Alice Shaw
Baker

Charleston, South Carolina
October 15, 2013.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT
COMMITMENT DIVISION
CASE NO: 2008-GC-10-088

In the Conservatorship of)
ALICE SHAW-BAKER,)
Deceased.)
Lisa Fisher, Conservator,)
Respondent.)

PERSONAL REPRESENTATIVE
BESSIE HUCKABEE'S
FIRST SET OF REQUESTS TO ADMIT
TO RESPONDENT LISA FISHER.

TO: Respondent Lisa Fisher

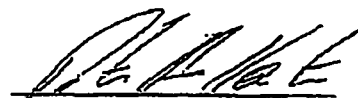
Bessie Huckabee, as court-appointed Personal Representative for the Estate of Alice Shaw-Baker serves, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, her First Set of Requests to Admit on the Respondent; as follows:

REQUESTS TO ADMIT

1. Admit that you or your Attorney turned over the Last Will and Testament of Alice Shaw-Baker that is currently being probated, to the Charleston County Probate Court Commitment Division subsequent to your appointment as Guardian and Conservator.
2. Admit that the original of the aforementioned Will remained in your possession or the possession of your counsel until the death of Alice Shaw-Baker.
3. Admit that you or your counsel turned over the aforementioned original Will to the Charleston County Probate Court Estate Division after the death of Alice Shaw-Baker.
4. Admit that you made no formal objection to the Last Will and Testament of Alice Shaw-Baker which was in the Probate Court's possession until after her death.
5. Admit that you are currently discharged as Conservator for Alice Shaw-Baker.

6. Admit that you are currently a licensed attorney in the State of California and you fully understand the responsibilities and duties of a conservator in the State of South Carolina.
7. Admit that you filed a final accounting with the Charleston County Probate Court Commitment Division when you sought discharge as Conservator for Alice Shaw-Baker.
8. Admit that you sought to hold the conservatorship funds in trust after your discharge as Conservator for Alice Shaw-Baker.
9. Admit that you expended funds from the conservatorship account(s) after you were discharged as Conservator for Alice Shaw-Baker.
10. Admit that acting as conservator and spending conservatorship funds while discharged is considered an improper act under the South Carolina Probate Code.

These Requests to Admit shall be deemed continuing in nature and should the Respondent, at a later date, come into possession, custody and/or control of any information that would further explain or admit, then such information and admission should be promptly produced.



Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
Attorney for Bessie Huckabee as Personal
Representative for the Estate of Alice Shaw
Baker

Charleston, South Carolina

October 15, 2013.

PROOF OF DELIVERY

CERTIFICATE OF SERVICE

Conservatorship of Alice Shaw Baker

2008-GC-10-0088

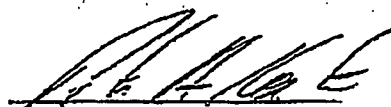
I hereby certify that on October 15, 2013 discovery requests including Petitioner's 1st Request to Admit, Petitioner's 1st Interrogatories and Petitioner's 1st Requests to Produce in the above matter were delivered via US Mail.

Lisa Fisher, Esquire
PO Box 91112
Long Beach, CA 40801

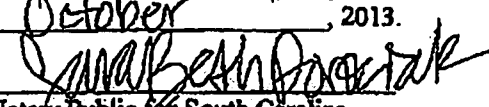
John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
Cain Denny, Esquire
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, SC 29464

John Robinson, Esquire
36 Broad Street
Charleston, SC 29401

Mary Frances Jowers, Esq.
Honorable Alan Wilson
Attorney General for SC
Post Office Box 11549
Columbia, SC 29211


Peter A. Kouten, Esquire
Kouten Law Firm, LLC
PO Box 340
Johns Island, SC 29457
Attorney for Bessie Huckabee as
Personal Representative for the
Estate of Alice Shaw Baker

Sworn to before me this 15 day of
October, 2013.


Notary Public for South Carolina

My Commission Expires: 10/14/22

KOUTEN LAW FIRM, LLC

8 Gillon Street
Charleston, South Carolina 29401
TEL: (843) 670-3919
FAX: (843) 559-4102

Mailing address:
PO Box 340
JOHNS ISLAND, SC 29457

EMAIL: pkouten@gmail.com
www.elderlawcharleston.com

October 15, 2013

Lisa Fisher, Esquire
PO Box 91112
Long Beach, CA 40801

John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
Caine Denny, Esquire
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, SC 29464

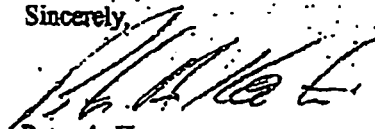
Re: Matter of Alice Shaw Baker
2008-GC-10-0088

Dear Respondent & Counsel for Respondent:

Please find enclosed Discovery Requests with Certificate of Service in the above action.
Please respond accordingly.

Please contact me if you have any questions regarding these Requests.

Sincerely,


Peter A. Kouten

W/Enclosures

CC: Client
John Robinson, Esquire
Mary Frances Jowers, Esquire
Brooke Wills, Esquire

12-1332

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-1332

2014 JAN 22 AM 10:16
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Appellant

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten Respondents

NOTICE OF APPEAL

Betty Fisher, as Real Representative for Alice Shaw Baker, appeals the following judgments and final orders of the Honorable J.C. Nicholson, Jr. granting summary judgment and dismissing the action against Defendants, Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Peter Kouten:

1. Judgment dated May 7, 2013 and filed May 8, 2013;
2. Judgment dated and filed September 3, 2013;
3. Judgment dated December 12, 2013 and filed December 18, 2013.

Appellant received written notice of entry of this judgment on December 24, 2013.

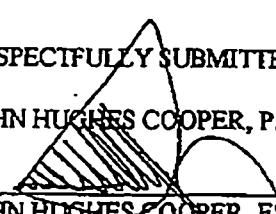
4. Order dated December 12, 2013 and filed December 18, 2013;

Appellant received written notice of entry of the final Order on December 24, 2013.

January 21, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

Other Counsel of Record:

W. Westbrook Wills III, Esquire
38 Broad Street Ste. 200
Charleston, SC 29401
(843) 805-6300
(Attorney for Respondents,
Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457
(843) 789-9614
(Attorney Pro Se and
Attorney for Respondents,
Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No 2014-000175
Circuit Case No. 2012-CP-10-1332

Betty Fisher, as Real Representative
for Alice Shaw-Baker.....Appellant

v

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

FINAL BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099, fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste 7
Mount Pleasant, SC 29464
843-883-9099, fax 843-883-9335

(Attorneys for Appellant)

RECEIVED

SEP 02 2014

SC Court of Appeals

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I.

STATEMENT OF ISSUES ON APPEAL

- 1 WHETHER SOUTH CAROLINA'S PUBLIC POLICY REGARDING
PROTECTION OF THE ELDERLY ESTABLISHES THIRD PARTY
STANDING FOR APPELLANT
2. WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT
LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS,
WHEN CASE LAW AND ESTABLISHED EQUITABLE PRINCIPLES
RELATING TO TRUST LAW AUTHORIZES A BENEFICIARY TO
COMMENCE AN ACTION AS "TEMPORARY REPRESENTATIVE" FOR
THE BENEFIT OF THE ESTATE
- 3 WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT
LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS,
DESPITE STATUTORY PROVISION IN SOUTH CAROLINA CODE ANN §
15-5-90(1976) ALLOWING A "REAL REPRESENTATIVE" TO PURSUE A
DECEDENT'S SURVIVAL ACTION.
- 4 WHETHER THE CIRCUIT COURT IMPROPERLY CONSIDERED THE
MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER
KOUTEN, WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE

PLEADINGS AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY.

5. WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENTS BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD, WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AS DEMONSTRATED BY APPELLANT'S EXPERT WITNESS DECLARATIONS AND LAY WITNESS DECLARATIONS.
6. WHETHER THE CIRCUIT COURT ERRED BY ALLOWING PETER KOUTEN TO ACT AS COUNSEL FOR BESSIE HUCKABEE, KAY PASSAILAGUE, AND SANDRA BYRD, WHEN HE WAS PREVIOUSLY COURT APPOINTED ATTORNEY/GUARDIAN AD LITEM FOR THE DECEDENT
7. WHETHER THE CIRCUIT COURT ERRED IN CONSIDERING COUNSEL PETER KOUTEN'S ARGUMENT AS FACTUAL CONTENTIONS, WITHOUT RULING ON APPELLANT'S OBJECTIONS.

II. STATEMENT OF THE CASE

"The old proverb that a man's home is his castle embodies a rich heritage of truth. All things in it or about it are as fine gold to them that dwell there. It is their palace to their friends, their refuge from toil and unkind foes. There they commune with the thoughts of the wise and virtuous, thrill under the spell of music, enjoy laughter and love. He who maliciously aims and attempts to destroy the peace and recreative value of a home robs its inmates of immeasurable riches and does an inestimable damage."

Alice Shaw-Baker died on February 25, 2009

Thereafter, her home, her life's works, and those mementoes that she held dear became subject of litigation in both a Will Contest and this Survival action in the circuit court. In this action, Appellant Betty Fisher, Alice Shaw Baker's niece, sued Respondents Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Attorney Peter Kouten (Hereinafter "Respondents") for alleged wrongdoing to Ms. Shaw Barker during her life

Appellant brought this underlying action after discovering the "inestimable damage" that her aunt, Alice Shaw-Baker, suffered during the last years of her life as alleged in the Verified Complaint against Respondents. Said complaint included causes of actions for 1) Violation of Omnibus Adult Protection Act pursuant to S.C. Ann. Code § 43-35-5 et seq.; 2) Breach of Fiduciary Duty, 3) Legal Malpractice, and for 4) Attorney

¹ See *Griffin v Northridge*, 67 Cal App 2d 69 (1944). While there is no comparable legal authority under South Carolina law, the principles set forth in the statutory scheme for Vulnerable Adults under the Omnibus Adult Protection Act, South Carolina Ann. Code § 43-35-5 et seq. demonstrates a commitment toward the Elderly in both the judicial and legislative setting. As argued herein, Appellant contends that it supports a private cause of action for recovery of damages to Alice Shaw-Baker (See also, U.S. Const. Amendments IV and XIV, § 1 and S.C. Const. Art. 1, § 3).

Fees and Costs. ("Complaint") (R 17) The Complaint was filed on February 24, 2012- one day before the action would be barred by the Statute of Limitations.²

To preserve these causes of action, Appellant Betty Fisher ("Appellant") brought this survival action for Alice Shaw-Baker under South Carolina Ann Code § 15-5-90 as "real representative" and based on her standing as an "heir at law."³ In addition to statutory authority, there is well established precedent concerning Appellant's standing to pursue the action as a "temporary representative" under equitable principles.

Other issues which impacted the briefing of this matter in the circuit court included analysis of the Public Policy basis for permitting third parties to assert claims for Vulnerable Adults and/or Decedents; Respondent Peter Kouten's waiver of the standing issue due to his failure to identify himself in these proceedings, the failure of the court to recognize Expert Opinion and Lay Evidence existed as to the alleged wrongdoing by Respondents to Alice Shaw Baker, allowing Respondent Peter Kouten to Act as Counsel for the other Respondents when he had a non-waiveable adverse interest due to his prior appointment as Court Appointed Counsel and Guardian ad litem for the decedent Alice

² R 348, l 20-25

³ See *Duke, et al v Postal Telegraph Cable Co*, 71 S C 95, 50 S E. 675, 676 (1905).

Appellant is also petitioner in a Will Contest action entitled *In the Matter of Alice Shaw Baker Estate, Betty Fisher et al v Bessie Huckabee et al*, case no 2009-CP-10-3010 (R 19) This separate action seeks to remove the personal representative, Respondent Bessie Huckabee, and additional claims against Respondents Kay Passailague Slade and Sandra Byrd to recover Alice Shaw Baker's estate for the benefit of animal charities. This "Probate Action" continues to be prosecuted, however there have been several motions and previous Appellate review Final determination of the issues in the probate action have not been decided

Shaw Baker; and consideration of argument as evidence during the circuit court without ruling on Appellant's objections.

On January 22, 2014, Appellant timely filed her *Notice of Appeal* seeking reversal of all *Orders Granting Summary Judgment*, including the final Order affirming prior order granting summary judgment in favor of defendant dated December 18, 2013 (R. 277)

If the circuit court's decision stands, the "immeasurable riches" of Alice Shaw Baker, including her hard work and charitable works in South Carolina, will be lost, as the Statute of Limitations has run. Therefore, the Estate of Alice Shaw Baker will not be able to recover for the harm that Alice Shaw Baker suffered during her lifetime. As the law is set forth herein, this result is neither correct nor justified by the facts and law of this case

III.

STATEMENT OF FACTS

a. *Background Facts*

Alice Shaw Baker had long been an important member of South Carolina's community. She was a member in good standing of her church. She volunteered her time rescuing animals. She had devoted her life to caring for animals and supporting animal charities. (R. 22)

She was born August 14, 1929 in San Francisco, California. Ms. Shaw-Baker was enlisted in the United States Navy for four years and, during her enlistment, stationed in Charleston, South Carolina

Thereafter, Appellant alleges that Ms Shaw-Baker worked for Charleston Memorial Hospital for approximately twenty years until her retirement Appellant

contends that Respondents Huckabee, Slade, and Byrd worked for Ms Shaw Baker at Charleston Memorial Hospital, and used their working relationship with Ms Shaw Baker to gain information about her private life, her finances, and her estate plan. Furthermore, Respondents used this information to gain control over Ms Shaw Baker's mind and her will, and to interfere with the known estate plan that Ms Shaw Baker had established for the benefit and protection of animals

As alleged in the Verified Complaint, Respondents Huckabee, Slade, and Byrd told Ms Shaw Baker that they would help her when she was older, make sure she could stay home, and make sure that her health, personal and financial decisions were properly addressed. Also, Appellant alleged that Respondents falsely claimed that Slade owned an animal rescue in their effort to deceive Ms Shaw Baker

However, when that time came, they refused to help her. She was allowed to deteriorate and live in substandard conditions. They refused to call family and interfered with her medical treatment all leading to her early demise. Appellant contends that these actions constituted abandonment, neglect and led to unnecessary and unhealthy isolation.

It also promoted the involvement of the State and the filing of a conservatorship proceeding against Ms Shaw Baker (*Conservatorship of Alice Shaw Baker*, Case no 2008-GC-10-088 ("Conservatorship case")) (R 19)

During these proceedings, the probate court appointed Respondent Attorney Peter Kouten as *Court Appointed Counsel*, Guardian Ad litem, and visitor to Alice Shaw Baker. However, Ms. Shaw Baker agreed to the appointment of her great niece as conservator/guardian in October 2008 (R 19)

Thereafter, Appellant alleges that she discovered that Respondent Kouten dually represented the other Respondents while Alice Shaw Baker was still alive and at her home, and not merely after her death. These actions are alleged to be in violation of Rules of Professional Conduct and were actions that were adverse to the wishes of Ms. Shaw Baker.

b. Procedural History

On or about February 24, 2012, Appellant filed a Complaint as real representative on behalf of Alice Shaw Baker (R. 17)

Respondents⁴ filed a *Motion for Summary Judgment and Dismissal of Action* on or about July 16, 2012. The grounds were: 1) that the claims were the same as under the Probate Action; 2) that Appellant failed to state a claim upon which relief can be granted; and 3) that Appellant had not "obtain[ed] a favorable determination" that she has standing (R. 43) Appellant contends that Respondents modified these grounds to include "lack of jurisdiction, authority and standing to sue on behalf of the decedent."

(R. 156) Thereafter, the court granted summary judgment on behalf of Respondents

Respondent Kouten filed said motion as attorney for Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd. The *Motion for Summary Judgment* did not address the Legal Malpractice cause of action against Respondent Kouten, nor did it indicate that he was filing the motion on his own behalf (R. 43)

⁴ These parties filed the motion as Respondents, instead of Defendants. The motion failed to reference *any* of the Respondents names in the motion, although Respondents Huckabee, Slade, and Byrd signed verifications. Respondent Kouten signed as *Attorney for Respondents* (See R. 46) As set forth herein, Appellant continues to contest Respondent Peter Kouten's status as a party in the motion (See below, § IV (d))

In response, Appellant filed a *Motion to Disqualify and Remove Opposing Counsel Peter Kouten due to Non-Waivable Conflict of Interest* on August 1, 2012. (R 50) Said motion was based on Respondent Kouten's prior representation of the decedent Alice Shaw Baker in the Probate Court, Conservatorship matter⁵

Appellant also filed a *Return, Objection and Opposition by Plaintiff Betty Fisher, as Real Representative for Alice Shaw-Baker to Motion for Summary Judgment, and Dismissal of Action, Memorandum of Law, Affidavits in Support* concurrently on November 26, 2012. ("Return") (R 73) These documents included an Affidavit of Lisa Fisher Esquire with attached exhibits verifying the factual statements in the Return (R. 122), Affidavit of Expert David Kessler and attached his Resume/CV Said testimony outlined wrongdoing by Respondents (R. 88); Affidavit of Candace Rickborn also verified factual allegations supporting Appellant's claims (R. 102); and addressing the allegations of Legal Malpractice, Attorney Expert Mark W Hardee executed an affidavit with his attached CV filed in support of Appellant's Return. (R 111)

On or about November 28, 2012, Respondents filed a *Memorandum Supporting Summary Judgment and Dismissal and Opposing Disqualification and Removal of counsel* (R 135)⁶

Appellant filed her *Supplemental Memorandum in Opposition to the Motion for Summary Judgment and Dismissal of Action* on December 7, 2012 (R. 145)

⁵ Appellant brought this matter to this Court's attention in the prior appeal related to the underlying Will Contest matter, Case no 2009-CP-10-3010.

⁶ Appellant filed objections to the procedurally deficient *Notice of Appearance* of Counsel W. Westbrook Wills He filed no pleadings and did not argue at any of the hearings (R. 216)

A Supplemental Memorandum Supporting Motion for Summary Judgment and Dismissal of Action was filed by Respondent Kouten on December 20, 2012. (R. 156)

To preserve Appellant's rights, obtain the rationale of the Circuit Court, and avoid waiver, Appellant filed a *Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013* (R. 161, see R. 370-371) In support of that Motion, Counsel John Hughes Cooper filed Appellant's expert and lay affidavits and the same Exhibits supporting the original *Return*⁷ The court amended the original order of May 8, 2013 on September 3, 2013 to correct a clerical error ending the probate action. (R. 7)

On October 18, 2013, Appellant filed a *Supplemental Brief re. Motion by [Appellant] Betty Fisher to Alter, Amend, Reconsider and Vacate Order of May 8, 2013, Memorandum, Affidavit of John Hughes Cooper*. (R. 226)

Respondent Kouten filed his *Supplemental Memorandum Denying [Appellant's] Motion reconsidering Summary Judgment* filed on October 22, 2013 (R. 258)

Another briefing was filed by Appellant regarding the Late Filed Memorandum of Respondent Kouten and Substitution of Counsel on October 29, 2013 (R. 249)

On December 18, 2013, the Circuit Court issued its Form 4 Judgment in a Civil Case and Order Affirming Prior Order Granting Summary Judgment in favor of Defendant dated December 18, 2013 (R. 9)

The timely filed Notice of Appeal was filed and served on January 22, 2014 (R. 277)

⁷ For judicial economy, as part of the record, Appellant files only one set of the original exhibits.

c. *Final Ruling and Order*

"Plaintiff's Motion to Reconsider filed on May 28, 2013 came before the Court on October 8, 2013. Plaintiff was represented by Lisa Fisher and John Hughes Cooper. Defendant was represented by Peter A. Kouten. Plaintiff asked the Court to reconsider its order of May 8, 2013, in which it granted summary judgment in favor of Defendants. Upon further review of the matter, Plaintiff's Motion to Reconsider is DENIED and the Court's order of May 8, 2013, is REINSTATED and Defendant's motion for summary judgment is GRANTED in favor of the Defendants.

FINDINGS OF FACT

1. Alice Shaw Baker ("decedent") died on February 25, 2013.
2. An estate was opened in the Charleston County Probate Court within thirty days of her date of death.
3. Plaintiffs delivered the Last Will and Testament to the Charleston County Probate Court and the personal representative was nominated pursuant to the Last Will and Testament and appointed.⁸
4. Plaintiffs filed a will contest of the Last Will and Testament and sought removal of the Personal Representative in a complaint filed on April 27, 2009.
5. Plaintiff filed the current action on February 24, 2012, under the Charleston County Circuit Court file number 2012-CP-10-1332.

CONCLUSIONS OF LAW

"Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The evidence and inferences drawn therefrom should be viewed in the light most favorable to the non-moving party." *Southern Contracting, Inc. v. H C Brown Construction Co, Inc.*, 317 S.C. 95, 450 S.E. 2d 601 (Ct. App. 1994).

[¶] The Court's prior order granted summary judgment on the basis that Plaintiff lacked standing to sue on behalf of the decedent in the current action. Plaintiff argues that as a beneficiary of the decedent's estate, she is a "real representative" pursuant to South Carolina Code Annotated Section 15-5-90, which states:

⁸ Appellant contests the facts as set forth in the Order. She further contends that the informal appointment of Respondent Huckabee was based on a "revoked" Will and without proper notice in violation of Due Process and Equal Protection. Further, the Will contest seeks removal of Respondent Huckabee. Moreover, Appellant objected at the hearing to the rendition of "facts", which was merely argument by counsel which will not support this order. (See *Gilmore v. Ivy*, 290 S.C. 53, 348 S.E. 2d 180 (1986).)

[¶] Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding

[¶] Furthermore, the Plaintiff argues that she is deemed a "real representative" based on her interpretation of a 1905 South Carolina Supreme Court case which states "causes of action for and in respect to any and all injuries and trespasses, to and upon real estate, shall survive both to and against the personal or real representative (as the case may be) of deceased persons, ' etc. The heirs at law are the real representatives " *Duke, et al. v Postal Telegraph Cable Co*, 71 S C 95, 50 S E 675, 676 (1905)

[¶] Plaintiff argues that she is able to bring an action under Section 15-5-90 against the Defendants because she is a real representative of the decedent's estate, rather than a personal representative, because she is a beneficiary of the decedent's estate. The Court disagrees with Plaintiff's interpretation of a real representative. Historically, a real representative was able to bring actions "in respect to injuries and trespasses to and upon *real estate* " *Duke*, 50 S E at 676 (emphasis added) The Court finds that a real representative is unable to bring an action on behalf of the decedent for injuries to the person or to personal property; rather, such action must be taken through the personal representative of the estate. Though the Court is sympathetic to Plaintiff because it understands that a personal representative will not sue itself, the Plaintiff's proper remedy is through the probate court and through the removal of the personal representative. Therefore, the Court reaffirms its prior decision and finds that Plaintiff lacks standing to bring the asserted causes of action."

[¶] Therefore, the Court's order of May 8, 2013, is in REINSTATED and Defendant's motion for summary judgment is GRANTED."(R. 10)

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ARGUMENT

IV.

THE ORDER GRANTING RESPONDENTS' SUMMARY JUDGMENT MUST BE REVERSED, TO ALLOW APPELLANT THE OPPORTUNITY TO PRESERVE THE SURVIVAL ACTIONS ON BEHALF OF DECEDENT ALICE SHAW BAKER

A. *Standard of Review*

It is well settled that in an action in equity, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence (See *Townes Associates, Ltd v. City of Greenville*, 266 S.C 81, 221 S.E. 2d 773 (1976))

Inasmuch as this case involves equitable issues relating to trusts and vulnerable persons, Appellant contends that this court may make its own findings

However, even in the plain legal context, Summary judgment is not appropriate when there is a genuine issues of material fact (See *Café Assocs , Ltd v Gerngross*, 305 S.C 6, 406 S.E 2d 162 (1991))

Further, if further inquiry into the facts of the case is required to clarify the application of the law, summary judgment is not proper (*Middleborough Horizontal Property Regime Council of Co-Owners v Montedison*, 320 S C 470, 465 S E. 2d 765 (1995))

Summary Judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusions to be drawn therefrom (*MacFarlane v Manly*, 274 S C 392, 264 S E 2d 838 (1980))

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As the Supreme Court of South Carolina has held:

"Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues"[. . .] ("an extreme remedy to be cautiously invoked"). This means among other things, that summary judgement must not be granted until the opposing party has had a full and fair opportunity to complete discovery. (See *Baughman v American Telephone and Telegraph Co*, 306 S C 101, 112, 410 S E 2d 537, 543).

In the *Estate of Cantrell*, 302 S.C 557, 559, 397 S E 2d 777, 778 (1990), the court explained:

"On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In this case, the main issue is Appellant's standing to prosecute the case. Since the circuit court used standing as its sole basis for granting summary judgment, issues related to disqualification of Respondent Kouten and expert testimony related to wrongdoing by all of Respondents were never ruled upon. The Circuit Court did not allow discovery in this matter. Appellant contends that this prevented the court from critical factual issues which would have led to an evidentiary dispute as to why Betty Fisher, and Betty Fisher alone, is the person to prosecute these actions, as allegations concerning the competency of Respondent Huckabee to act, in light of the alleged adverse interests, should have been considered as set forth herein.

B. This Court has Authority to Safeguard Rights for Persons Under A Disability, and the Public Policy of the State of South Carolina Supports Third Party Standing

It is well settled that this court has jurisdiction to review matters where the rights of persons under a legal disability are at issue (See *Galloway v Galloway*, 249 S C 157, 153 S E. 2d 326 (1967), *Stefan v Stefan*, 320, S C. 419, 495 S E 2d 734 [appellate court will consider issues not preserved when they involve the rights of minors]; *Joiner ex rel Rivas v Rivas*, 342 S C 102, 536 S E, 2d 372 [procedural rights subservient to court's duty to zealously guard the rights of minors])

The Court in *Williams v Watkins*, 665 S.E 2d 243, 379.S.C 530 (2008) explained the purpose of the Omnibus Act, which is to “protect vulnerable adults from abuse, neglect, and exploitation.” Although the statutory scheme involves actions that include criminal punishment, a federal court explained that the structure of the legislation also established a private cause of action for abusing, neglecting, or exploiting vulnerable adults. (See *Williams Garrett*, 106 F Supp 2d 834 (2000)) (R. 82)

Although this case involves issues that relate to a decedent, the underlying facts deal with a vulnerable adult, Alice Shaw Baker, who is alleged to have been exploited during her life time. It appears, based on the far reaching public policy seeking protection of vulnerable adults, as evidenced by the enactment of the Omnibus Adult Protection Act, South Carolina Code Ann. § 43-35-5 et seq, this is likely to be a recurring issue in South Carolina law. Other jurisdictions recognize expansive views of Elder abuse laws to pursue Elder Abuse /Dependent Adult Abuse causes of action. (See *Estate of Lowrie* (2004) 118 Cal App 4th 220, 12 Cal Rptr 3d 828, See also, *In re Estate of Wyttenbach*, 193 P.3d 814, 219 Ariz 120 (2008) [allowing the statute to preclude late-appointed personal representative from bring elder abuse action violates spirit of Ariz. Adult

Protective Services Act § 46-455.], See Oregon Rev Stat § 124.100 [allows victim, guardian, conservator, personal representative, trustee or agent of fact to bring cause of action for elder abuse])⁹

Moreover, this private right of action can not be available merely when the elder is alive. To effectuate its purposes, the Omnibus Act provides for a panoply of remedies, and by implication gives standing to third parties. Logically, if third parties do not have standing, then the scheme would be meaningless, because vulnerable adults would not be able to obtain necessary assistance while alive and the wrongdoer could avoid discovery by merely obtaining the nomination as an "executor/personal representative" in a Will.

South Carolina has shaped an important legal framework which supports the important tool of allowing the next of kin/heir at law to pursue actions on behalf of the vulnerable to prevent widespread physical and financial abuse of the elderly ¹⁰ All of the alleged events occurred during the period of time where she met the criteria for a Vulnerable Adult pursuant to South Carolina Code § 43-35-10(11) Therefore, this court may consider the rights of vulnerable adults ex mero motu (*Galloway, supra*) Alice Shaw Baker's condition prior to death precluded her from taking action against Respondents.

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⁹ See R 380, ll. 12-14

¹⁰ Appellant is an heir at law, and she has a claim to an interest which can not be lost (See *All Saints Parish, Waccamaw v The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S C. 209, 222 (2004)) Nevertheless, Appellant contends that all of Alice Shaw Baker's assets were intended to go to animal charities

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**C. Appellant has Standing to Pursue Alice Shaw Baker's Survival Action,
Based on Respondents' Actions and Equitable Principles in Trust Law**

In Justice Harlan's dissent in the United States Supreme Court decision of *Flast v Cohen*, 392 U S 83, 129 (1968), the standing doctrine was described as "a word game played by secret rules".¹¹ While this can seem true, Appellant believes that third party standing in matters relating to elder abuse, trusts, probate, and/or fiduciary duties brings clarity and reveals safeguards in these equitable cases

It is well settled that the court in *Williams-Garrett v Murphy*, 106 F Supp 2d 834 (2000), found a private right of action existed for violation of the Omnibus Act. Therefore, Appellant contends it is subject to a survival action, and to the equitable and legal grounds necessitating third party standing be granted to Appellant.

In Appellant's case, the Circuit Court's decision granted summary judgment to Respondents who failed to address the third party doctrine in their pleadings. Third party standing is a well accepted concept in many cases. Specifically, the case *Amisub of South Carolina, Inc V Passmore*, 316 S.C 112, 447 S E 2d 207 (1994) permitted standing to a hospital to pursue a cause of action for violation of the Omnibus Act. (See below, § IV (c))

In *Holz v Minyard*, 304 S C 225, 403 S E.2d 634 (1991), the court reversed summary judgment where an attorney misled a daughter concerning the effect of her

¹¹ Even the Honorable court acknowledged at the hearing on November 28, 2012 that the issue of standing in this case "may be accepted practice but it's not the routine practice." The "novelty" of the question provides additional grounds for this court to consider the issues and deny summary judgment. (See *Schmidt v Courtney and Kemper Sports*, 357 S C 310, 324, 592 S.E 2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery in relation to "novel theory."])

father's will. This fiduciary relationship between the attorney and the daughter was significant in the court's rationale. The court held that a lawyer may not actively misrepresent the status of a Will/Estate plan to the beneficiaries. Here, Appellant has asserted that Respondent Kouten actively represented the other Respondents *before* Alice Shaw Baker's death. This constituted a non-waivable conflict of interest. Further, Appellant claims that Respondents knew that Alice Shaw Baker's sole intent in drafting the (now revoked) will was to benefit animal charities. Respondent Kouten's interest in misrepresenting the intent of said Will was for his own self interest, contrary to both ethical and legal standards. If Respondent Kouten took the correct position, he would not gain employment from Respondents, this alone is a genuine issue of material fact that precludes summary judgment.

Moreover, the equitable third party standing doctrine explains why Appellant is not required to obtain a final adjudication of her *Petition to Remove Respondent Bessie Huckabee* as the named personal representative in the informal probate,¹² *before* safeguarding Alice Shaw Baker's Survival causes of action and pursuing these causes of action.

The Circuit Court recognized the import of its decision, when it found that Respondent Huckabee as personal representative would "not sue itself", and by implication, would not sue the other Respondents. (R. 12) However, the Circuit Court's Order *does not* take into account the exceptions permitting a beneficiary to sue when an

¹² Appellant does not concede or admit the validity of the informal probate. The issues and facts surrounding the grant of the informal probate are disputed and the subject of the Probate litigation. Appellant is seeking to vacate that order and/or remove Huckabee as personal representative in the Probate action.

adverse interest exists— but it is these exceptions (coupled with the statutory scheme, discussed below) which mandate reversal

The court in *Bailes v Southern Railway Co. Et al* , 227 S C. 176, 87 S.E 2d 481 (1955) held specifically that.

"If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In so doing, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust."(Emphasis added)

The South Carolina Supreme Court went on to say that:

" The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death. Its applicability to such actions is discussed in the annotation following *Cudney v United Power & Light Corp* , 1935, 142 Kan 613, 51 P 2d 28, in 101 A L R 835, at pages 840 *et seq* , with the comment that 'in the few cases discovered where, upon the failure of an executor or administrator to perform his duty as the only proper party to bring or prosecute an action under the death statute, the beneficiary has started suit to recover damages for the death, the courts have upheld the right of the beneficiary to begin such action '" (Emphasis added)

Further analysis of this principle is more fully explained in the treatise, Bogert, The Law of Trust and Trustees, § 869, ch 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119

"If the trustee cannot or will not enforce the cause of action running to him for the benefit of the beneficiary, a practical difficulty arises which compels the courts to vary their usual rules as to parties There is danger that the cause of action may be barred by laches or the operation of the

Statute of Limitations, if the beneficiary is obliged to wait for the trustee to act, or is forced to sue the trustee to compel action, or to bring a proceeding for the removal of the trustee and the appointment of a successor. In addition the financial condition of the third party may change so that all relief will be shut off. In such an emergency the court permits a suit in equity by the beneficiary to enforce the cause of action running to the trustee, in which case the third party and the trustee should be made parties defendant. The beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary." (R. 227-228, emphasis added).

Here, Appellant acts as temporary representative of the Estate of Alice Shaw

Baker. The same harm, outlined in Bogert, applies in this case

- Appellant was forced to file this action to prevent a bar by the Statute of Limitations;
- Respondents will not sue each other for their collusion and/or the alleged wrong that Alice Shaw Baker suffered.
- Appellant has filed an action seeking to remove Respondent Huckabee, however the procedural delays in this case do not justify losses of Alice Shaw Baker's causes of action.

Therefore, the impact of *Bailes* and the analysis in Bogert can not be overstated. It provides for third party standing in survival actions, and it even can apply *in wrongful*

*death cases*¹³ Currently, under South Carolina Ann Code § 15-51-20, wrongful death actions are to "...be brought by or in the name of the executor or administrator," and there is no exception stated in the statute for a "real representative". As set forth below, the Survival cause of action is not limited to preclude third party standing.

These principles demonstrate that Appellant may pursue the claims on behalf of Alice Shaw Baker's estate for the benefit of the rightful beneficiaries, and granting Summary Judgement based on lack of standing was error.

D. Appellant has Standing to Pursue Alice Shaw Baker's Survival Action, Based on Statutory Authority under South Carolina Code § 15-5-90

The above section discusses the equitable arguments for allowing third party standing in matters relating to trusts. This argument works in conjunction with the statutory authority compelling reversal in this matter.

South Carolina Ann Code § 15-5-90 provides

"Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or **real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding" (Emphasis added)**

¹³ This case is not a wrongful death action, it is a survival action, however at the hearing on November 28, 2012, it was clear that Respondents were presenting the case as a "joint issue" requiring filing in the probate court (R. 349, ll 5-8)

This specificity of the code, and provision for a “real representative” supports Appellant’s position that she can bring Alice Shaw-Baker’s causes of actions in the Circuit Court.¹⁴

Since the survival action code, South Carolina Code Ann. § 15-5-90, specifically provides that survival actions “shall survive both to and against the personal *or real representative...of a deceased person*,” (Emphasis added), and Appellant is an heir at law under *Duke v Postal Telegraph Cable Co*, 71 S C. 95 (SC 1905)[heirs at law are the real representatives],¹⁵ she has standing under statutory law

Further, contrary to Respondents’ arguments, there is no doubt that the circuit court had concurrent jurisdiction to hear the matter, and resolution did not require the probate court’s involvement.¹⁶ South Carolina Ann. Code § 62-1-302 (b) provides:

“The court’s jurisdiction over matters involving wrongful death or actions under the survival statute is concurrent with that of the circuit court and extends only to the approval of settlements as provided in Sections 15-51-41 and 15-51-42 and to the allocation of settlement proceeds among the parties involved in the estate.” (Emphasis added)

¹⁴ See R. 350, II 2-5, p. 351

¹⁵ Appellant Betty Fisher is the niece of Alice Shaw Baker, and therefore an “heir at law.” Additionally, Appellant previously filed a Formal Petition for Appointment as Administrator, therefore if successful in the Will contest litigation, she will be the duly appointed administrator, *not Huckabee*

¹⁶ Although the Circuit Court’s Order did not deal with the issue of concurrent jurisdiction, Appellant brings the issue to this Court’s attention to ensure proper consideration of the legal authority presented to the court and arguments brought to the court’s attention at the November 28, 2012 hearing, including the fact that the issue was not raised in the moving papers (R. 347, 348, II 6)

This "concurrent" jurisdiction is bolstered by the plain language of Section 62-3-804(2) of the South Carolina Code which allows a tort claimant to sue the personal representative of an estate in any court

In the case of Alice Shaw Baker, she would have had at least 3 (three) viable causes of action against Respondents--1) Violation of the Omnibus Act, 2) Legal Malpractice, and Breach of Fiduciary Duty, if she were still alive. Therefore, Appellant is duty bound to pursue these actions to preserve Ms. Shaw Baker's rights and recover her losses for the estate.

Since the Omnibus Adult Protection Act is a cause of action, based on statute, it survives the death of a party. (See 1 CJS Abatement and Revival § 151, at 206 (1985), see also 1 Am Jur. 2d Abatement, Survival and Revival § 53 (1994).) Additionally, since violation of a statute constitutes negligence per se, Appellant can use these violations to establish some evidence of recklessness and willfulness. (See *Id* at 354, 683 S E 2d at 823 [can establish punitive damages])

As briefly referenced above, the issue of standing was examined by the court in *Amisub of South Carolina, Inc v Passmore, supra*. The court explained that *third parties*, the hospital, have standing to assert the cause of action against a husband who refused to take financial responsibility for the care of his seriously ill wife. A close reading of the case demonstrates that the vulnerable person, the wife, died during the proceedings. Therefore, this also supports Omnibus Adult Protection Act as a remedial statutory scheme meant to afford victims and their estates with the means for recovery for harm suffered by a now deceased victim.

Therefore, whether the Court analyzes the code governing Survival actions or the Omnibus Act, the Circuit Court's fundamental error is that it interpreted these codes

according to Respondents' analysis of the code and definition of "real representative"-- finding that a real representative is limited to cases involving "injuries and trespasses to and upon *real estate*" (R. 12)

However, in well established rules governing statutory interpretation what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will (See *Bayle v. S C Dep't of Transp.*, 344 S C 115, 122, 542 S E.2d 736, 740 (2001)) Moreover, the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction (*Durham v United Cos Fin Corp* , 331 S C. 600, 604, 503 S E 2d 465, 468 (1998), *Adkins v Comcar Indus , Inc* , 323 S.C 409, 411, 475 S E 2d 762, 763 (1996); *Worsley Cos v S C Dep't of Health & Envtl Control*, 351 S.C. 97, 102, 567 S.E 2d 907, 910 (2002), see also *Timmons v S C Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S E 2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language) Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. (See *Hodges v Rainey*, 341 S.C 79, 85, 533 S E.2d 578, 581 (2000); *Bayle, supra*, 344 S C at 122, 542 S E 2d at 739)

With these clarifying principles, interpretation of S C Code Ann § 15-5-90 does not permit the court to find that the "real representative" is limited to actions involving "injuries and trespasses to and upon real estate and any and all injuries," because that would also mean that the "personal representative" is limited to these same types of actions. Nothing in the code or the legislative scheme supports such a reading, so

standing is conferred upon Appellant, as real representative ¹⁷ (See R. 366-368, 369, 373-383.)

E. Respondent Kouten Waived the Issue of Standing as to all Causes of Action, Therefore Summary Judgment must be Reversed

The Circuit Court also granted Summary Judgment in favor of Respondent Peter Kouten. However, Appellant has continued to object to Respondent Kouten's failure to file a responsive pleading or join the original motion ¹⁸ This refusal to join constitutes waiver.

The subject motion that led to Summary Judgment was based on "verifications" signed by Respondents Huckabee, Slade, and Byrd ¹⁹ Respondent Kouten signed documents based on his status as attorney of record, not in his own capacity. Moreover, none of Respondents' documents even raised arguments opposing the Legal Malpractice cause of action against Respondent Kouten. (R. 43, 156, 258)

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¹⁷ Appellant contends that summary judgment is also improper, because this area of law has not been developed (and may be construed as a "novel theory". (See *Schmidt v Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery])

¹⁸ Through the motion and supplemental pleadings, "Defendant" is used singularly. There isn't even a reference to Respondents Passailague, Slade and Byrd. The prayer in the *Supplemental Memorandum* (R. 261) is also referenced in the singular

¹⁹ A motion to dismiss under Rule 12(b)(6) is not converted into a Rule 56 motion by affidavits of some defendants served after the motion and not referred to in the memoranda. Here, there was no mention of any factual reference in the memoranda, because there were no affidavits

This cause of action was based on the fact that Respondent Kouten was Alice Shaw Baker's court appointed attorney in the Conservatorship action.²⁰ The allegations are that while Alice Shaw Baker was still alive, Respondent Kouten began representing Respondents Huckabee, Slade, and Byrd. This conflict of interest is impermissible as explained in *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). Respondent Kouten was prohibited from representing any parties with interests opposed to the best interests of his *ward*, Alice Shaw Baker. This basic principle is complicated by the financial gain that Respondent Kouten would gain by refusing to inform the probate court that Alice Shaw Baker intended her monies to go to animal charities—not Respondents.

While the conflict of interest should have immediately led to Respondent Kouten's disqualification, he continues to this day to represent the adverse interests of Respondents.

The court in *Valentine v. Davis*, 319 S.C. 169, 460 S.E. 2d 218 (1995) explained that individuals could not become parties by presumptuously adding their names to the caption and calling themselves plaintiffs. The court stated:

"We are unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions. To do so would jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system."
(Emphasis added)

Although *Valentine* dealt with a plaintiff, the same rationale applies here. Respondent Kouten made a "strategic" decision to avoid responding to the Complaint,

²⁰ Respondent Kouten was also appointed by the court as her guardian ad litem and visitor in the conservatorship action. Hereafter, Appellant will reference as "court appointed counsel" for all purposes.

intentionally failed to address the Legal Malpractice cause of action, and refused to name himself as a party--this compromises the *Order granting Summary Judgment* and deprives Appellant of Due Process/Equal Protection as a party is dismissed without seeking any relief from the court. (See also, U.S. Const. Amends. IV and XIV, § 1 and S.C. Const. Art 1, § 3)

In light of the fact that Respondent Kouten did not raise the issue of standing on his own behalf, Appellant contends it has been waived as to Respondent Kouten (See *Bardoon Properties, NV v Eidolon Corp*, 326 S.C 166, 485 S.E.2d 371 (S C. 05/12/1997); see also *We Sav Financial Corp v Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived])

Therefore, Summary Judgment as to Respondent Kouten must be reversed

F. *Summary Judgment was Improper as to Respondents Huckabee, Slade, and Byrd, as Genuine Issues of Material Fact are Demonstrated by Expert Witness Declarations and Lay Declarations.*

Although the issue of standing was used by the Circuit Court as the grounds for granting the Summary Judgment, Appellant does not waive the issue that her opposition to the motion and the support for her *Motion to Alter, Amend, Reconsider and Vacate Order* was supported by significant evidence supporting the causes of action alleged on behalf of Alice Shaw Baker Appellant filed lay and expert witness affidavits which demonstrated genuine issues of material fact

It is well settled that any relief obtained by plaintiff's Omnibus/Legal Malpractice action/Breach of Fiduciary Duty would be to recover for the damage incurred personally for Ms Shaw Baker--thus, it is a survival action for her benefit It is well settled that the

test of a survival action in South Carolina is whether the *decedent* suffered conscious pain and suffering. (See *Camp v Petroleum Carrier Corp*, 204 S.C 133, 139, 28 S.E.2d 683, 685 (1944) (emphasis added).)

With regard to the Omnibus Act, *Williams Garrett, supra*, outlines that the Act is "to provide civil and criminal penalties for abuse, neglect, and exploitation," of the disabled (S.C.Code Ann. § 43-35-5(9).) It also allows action by the Attorney General against persons or facilities for the failure to exercise reasonable care (See § 43-45-80)

By this dual application, and the further definition of neglect under S C Code § 43-35-10, survival actions were contemplated:

"Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death." (Emphasis added)

Common sense dictates that the ability to enforce the law must continue after death to ensure that wrongdoers will be either prosecuted or suffer some liability (See also, S C Code § 43-35-35 which outlines the manner to report deaths where abuse or neglect are suspected) (See also *Amisub of South Carolina, Inc V Passmore*, 316 S.C 112, 447 S E.2d 207 (1994))

Issues of Breach of Fiduciary duty are raised in cases where individuals suffer wrongdoing by those with fiduciary relationships. (See *Osprey, Inc v Cabana Limited Partnership*, 340 S C 367, 340 S C 367 (2000) [cause of action for Breach of Fiduciary abuse allowed to proceed]) These actions have also been permitted when an attorney misleads individuals concerning their estate inheritance (See *Holz v Minyard*, 304 S C

225, 403 S E 2d 634 (1991); see also, *Williams-Garrett v Murphy*, *supra* [for exploitation of a 90 year old vulnerable adult])

As to Respondent Kouten alone, the courts have long recognized that "[T]he relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith'" (See *Weatherford v Park*, 340 S.C. 572, 532 S.E. 2d 310 (2000) .)

The affidavits establish a genuine issue of material fact which precluded the grant of summary judgment. The unusual circumstance of not having an acting personal representative does not prevent Appellant from protecting the cause of action so that the statute of limitations does not run ²¹ For these reasons, Appellant requests that the court reverse the order in its entirety, and allow Appellant to prosecute the action on behalf of Alice Shaw Baker as real representative.

G. *The Court Erred by Failing to Rule on Appellant's Motion to Disqualify Respondent Kouten Who Acted as Counsel for Respondents when he was Alice Shaw Baker's Court Appointed Attorney*

At the hearing on November 28, 2012, the court considered the arguments relating to Appellant's *Motion for Disqualification* (R. 353-364)

²¹ Appellant presented evidence that Respondent Huckabee is subject to removal, and her removal is mandated in part due to her failure to give notice to family, her failure to obtain a bond as ordered by this Court on June 9, 2009, her concealment of estate assets in the inventory filed wherein she excluded the receipt of IRA funds belonging to Alice Shaw Baker in excess of \$16,000 00 and all the other grounds that Appellant asserted in her complaint (R. 17) However, this merely raises genuine issues of material fact to defeat the summary judgment motion, it does not require Appellant to obtain rulings prior to preserving Alice Shaw Baker's causes of action by the filing of this matter.

The Circuit Court reasoned that only Bessie Huckabee could complain about the conflict of interest that may have been raised by Respondent Kouten's dual representation.

However, this rationale failed to recognize the duty owed to Alice Shaw Baker. She was Respondent Kouten's "ward" as court appointed counsel in the conservatorship proceedings. It is well settled that a ward will be considered a client for the purposes of the rules relating to attorney conflicts of interest. (*Townsend v Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

Under the rules relating to attorney conflicts of interest, a lawyer owes a duty of loyalty to former clients. (*In re Johnson*, 386 S.C. 550, 689 S.E.2d 623 (2010), Rule 407, SCACR, Rule 1.9)

In evaluating a lawyer guardian ad litem's potential conflict of interest in subsequent relations, matters are "substantially related" when the guardian ad litem reasonably could have gained information in the first matter that would be relevant to the second matter. (See *Townsend v Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

Respondent Kouten, conducted an investigation pursuant to S.C. Code Ann. § 43-35-35 and regularly visited with Ms. Shaw Baker in October and November 2008 (R. 279, 283, 300). It is well settled that concurrent conflicts of interest can arise from a lawyer's responsibilities to a former client (See Rule 407, SCACR, Rule 1.7, Comment 1)

Moreover, the court in *Townsend, supra*, explained that a ward of an attorney guardian ad litem should not have to encounter that person in subsequent litigation in which the former guardian ad litem is representing anyone whose interests are potentially or actually adverse to the ward's. (See *Townsend v Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996).)

As argued, Respondent Kouten had a duty of advocating Alice Shaw Baker's true interests regarding the disposition of her estate. Appellant has argued that Respondent Kouten is not to determine the veracity of the conflicting allegations regarding the validity of Decedent's May 21, 2001 will nor the veracity of the conflicting allegations regarding Respondents' neglect of Alice Shaw Baker as a vulnerable adult.

Since a lawyer shall not represent a client if representation is adverse to another client's interests unless both clients consent, (*In re Johnson*, 386 S.C. 550, 689 S.E.2d 623 (2010), Rule 407, SCACR, Rule 1.7) and here Alice Shaw Baker can not consent, Respondent Kouten must withdraw from the representation.

The Court has ample authority, and, in fact, a duty to remove Respondent Kouten from representation of Respondents, because the Court must ensure the integrity of the proceedings before it (*Townsend*, *supra*)

Here, the Court did not rule on Appellant's *Motion for Disqualification*, so he continues to act on behalf of Bessie Huckabee. While Respondent Kouten filed ineffective *Notice of Appearance* by W. Westbrook Wills²² and later obtained a Consent Order substituting Counsel without notice to Appellants, this does not cure the defect in Respondent Kouten's continued representation of the other Respondents, because Alice Shaw Baker's interests have not been protected. Her death does not absolve the court of its duty in protecting her rights.

²² Its important to note that at the hearing on *October 8, 2013* , Appellant's counsel raised the issue of the proper representation by Attorney Wills and the *Notice of Association* (See R. 370 -373) Respondent Kouten made it clear that he was arguing on behalf of all Respondents, despite Attorney Wills' filing of the *Notice of Appearance*

H. The Court Erred in Considering the "Factual Contentions" of Respondent Kouten at the Hearings.

Appellant objected to Respondent Kouten's assertion of fact in the pleadings and at the hearings (R 74, 74 fn 3, 152, 153, 170-171, 175-176, 372-374) By implication, it appears that the circuit court considered some of the factual assertions of Respondent in making its Order

As the court in *Gilmore v Ivy*, 290 S C 53, 348 S E 2d 180 (1986) explained, a party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment "even though his adversary does not come forward with opposing materials.".. While statements of fact can constitute an "admission[]" on file" . and thus be entitled to consideration by the court in determining whether a genuine issue of material fact exists, *factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be so considered.* " (*Id* , *emphasis added*)

Also, South Carolina Rules of Civil Procedure, Rule 56(e) have a personal knowledge requirement for purpose of said motion

Rule 7(b)(1), requires a motion to state with "particularity the grounds" for relief Moreover, the allegations do not accurately reflect the facts and events leading to this case. Therefore, it was error for the court to consider Respondent Kouten's argument as alleged "facts".

CONCLUSION

Appellant Betty Fisher comes to this Court, with a heart full of love yet gripped in sorrow, for her aunt, Alice Shaw Baker Without this respect for the Law and desire

to preserve her aunt's estate for animal charities, Alice Shaw Baker's Survival actions will be forever lost

The Circuit Court's sympathy for the procedural conundrum that the case is in will not rectify the harm suffered by Alice Shaw Baker and her estate. (See R. 384-385) However, as set forth in this brief, the Law does provide relief. It provides relief by the Policies of South Carolina on behalf of the Elderly, the statutory authority under South Carolina Ann Code § 15-5-90, and under the well accepted policies which enable a third party to effectuate standing in matters involving trusts and breach of trust, and support Appellant's position.

For all of the reasons stated herein, Appellant respectfully requests that the Court reverse.

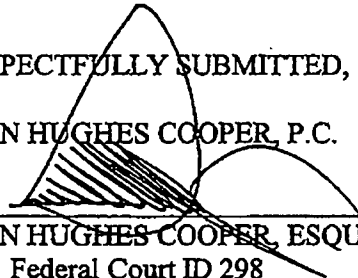
- a. The Form 4 Judgment in a Civil Case and Order case related to case 2009-3010 and this case is ended filed on May 8, 2013;
- b. The Order Granting Summary Judgment filed on May 8, 2013;
- c. Form 4 Judgment in a Civil Case and Order Affirming Prior Order Granting Summary Judgment in favor of Defendant dated December 18, 2013
- d. Order case related to case 2009-3010 and this case is ended filed on May 8, 2013;

e. The Order finding Appellant lacks standing.

Further, Appellant prays that the court allow her to prosecute her Complaint as real representative on behalf of Alice Shaw Baker.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

August 29, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175

Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
For Alice Shaw-Baker.....Appellant
v.

BESSIE HUCKABEE, KAY PASSAILAGUE SLADE,
SANDRA BYRD, and PETER KOUTEN, and DOES 1 through 100, Defendants,

Of Whom BESSIE HUCKABEE, KAY PASSAILAGUE SLADE,
SANDRA BYRD, and PETER KOUTEN are.....Respondents

PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant** and the **Final Reply Brief of Appellant** on the following counsel and parties by depositing on August 29, 2014 copies thereof in the United States Mail, postage prepaid, addressed as follows:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340a
Johns Island, SC 29457
(Attorney for Respondent Peter A. Kouten)

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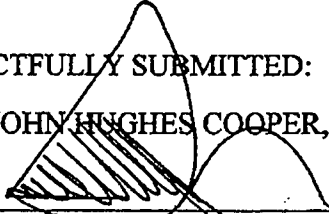
SEP 02 2014

SC Court of Appeals

August 29, 2014

RESPECTFULLY SUBMITTED:

JOHN HUGHES COOPER, P.C.



JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185586

1476 Ben Sawyer Blvd., Suite 7

Mt. Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro hac vice

c/o John Hughes Cooper, P.C.

1476 Ben Sawyer Blvd., Suite 7

Mt. Pleasant, SC 29464

883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175
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BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Appellant

v.

Bessie Huckabee, Kay Passailague Slade,
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Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

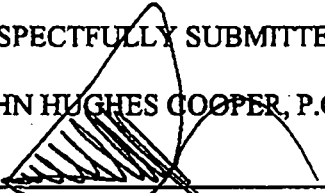
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

October 17, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335
843-883-9099; fax 843-883-9335

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OCT 22 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

PROOF OF SERVICE

I certify that I have served the CERTIFICATE OF COUNSEL on the following counsel
and parties by depositing a copy of it in the United States Mail, postage prepaid, on October ²⁰~~17~~,
2014 addressed as follows:

RECEIVED

OCT 22 2014

SC Court of Appeals

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

(Attorney Pro Se and Attorney for Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

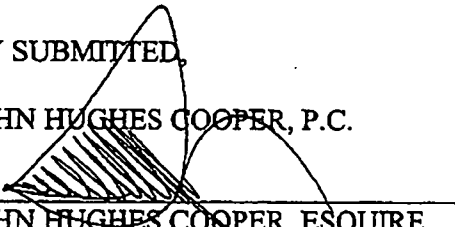
W. Westbrook Wills III, Esquire
38 Broad Street Ste. 200
Charleston, SC 29401

(Attorney for Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

October ²⁰/₁₇, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

RECEIVED

OCT 22 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable Thomas L. Hughston, Jr., Circuit Court Judge

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SEP 15 2014

SC Court of Appeals

Appellate Case No 2014-000175
Case No 2012-CP-10-1332

Betty Fisher, as Real Representative for Alice Shaw-Baker, Appellant, ..

v

Bessie Huckabee, Kay Passailague Slade, Sandra Byrd and Peter Kouten and Does 1 through
100, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd and Peter Kouten are the
Respondents

FINAL BRIEF OF RESPONDENT
PETER KOUTEN

Peter A. Kouten, Esquire
PO Box 340
Johns Island, SC 29455
843-789-9614

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STATEMENT OF ISSUES ON APPEAL

- 1 WHETHER SOUTH CAROLINA'S PUBLIC POLICY REGARDING PROTECTION OF THE ELDERLY ESTABLISHES THIRD PARTY STANDING FOR APPELLANT
- 2 WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS
- 3 WHETHER THE CIRCUIT COURT'S CONSIDERATION OF MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER KOUTEN WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE PLEADING AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY
- 4 WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENTS BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD REGARDING GENUINE ISSUES OF MATERIAL FACT
- 5 WHETHER THE CIRCUIT COURT ERRED BY ALLOWING PETER KOUTEN TO ACT AS COUNSEL FOR BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD WHEN HE WAS PREVIOUSLY COURT-APPOINTED ATTORNEY/GUARDIAN AD LITEM FOR THE DECEDENT

STATEMENT OF THE CASE

The initial action to which all ancillary matters attach is an action in the Probate Court of Charleston County In Re the Estate of Alice Shaw-Baker (hereinafter Alice), who died testate on February 25, 2009. Prior to her death, there were hearings to appoint guardian and conservator for Alice. Lisa Fisher, Esquire is a relative to Alice and sought appointment and was appointed guardian and conservator for Alice. The Appellant, Betty Fisher, is the mother of Lisa Fisher, both live in California. Alice was present at the final appointment hearing wherein the probate court sought to determine whether Alice had a last will. The prior temporary conservator indicated that she had a last will. The probate court ordered that it be delivered to the probate court and said last will was delivered and a certified copy is in the commitment division file. Upon Alice's death, Respondent Bessie Huckabee was appointed personal representative after Alice's last will, which nominated Bessie Huckabee, was presented to the probate court by John Hughes Cooper, Esquire, local counsel for Betty and Lisa Fisher and sponsor for Lisa Fisher's pro hac vice appointment for this and other filings.¹ Appellant sought by petition to void appointment of the personal representative, contest the will, appoint an intestate heir as personal representative, and contest the beneficiary designations of additional non-probate assets. Appellant removed these actions to Charleston County Court of Common Pleas by statutory right.

¹ There are currently two appeals in the South Carolina Court of Appeals regarding this estate matter. The second appeal in this Court seeks appeal of the lower court's order denying motion to disqualify counsel, appeal of the lower court's order denying reconsideration, and appeal of a consent order wherein counsel was substituted. Additionally, there are three appeals pending in the lower court brought by the appellant and/or her daughter. The petition contesting last will has not been heard. The petition to remove personal representative has not been heard. They were filed in 2009.

The Appellant brought the action currently on appeal by way of verified complaint having four causes of action

- 1 Appellant sought to be recognized as a “real representative” of Alice in order to bring a survival action on behalf of Alice under the South Carolina Omnibus Adult Protection Act,
- 2 Breach of Fiduciary Duty against all Respondents,
- 3 Legal Malpractice against Respondent Kouten,
- 4 Attorney Costs and Fees

The Appellant in her Notice of Appeal appeals

- a Judgment dated May 7, 2013 and filed May 8, 2013
- b Judgment dated and filed September 3, 2013
- c Judgment dated December 12, 2013 and filed December 8, 2013
- d Order dated December 12, 2013 and filed December 18, 2013

The May 8, 2013 order indicated that “Plaintiff’s Motion for Summary Judgment is Granted” The aforementioned motion for summary judgment was filed by Respondents There was a scrivener’s error in the order as to the party bringing the motion More importantly, the order of May 8, 2013 indicated that the related case of 2009-CP-10-3010 “also ended ”

The September 3, 2013 order amended the scrivener’s error and indicated that “Defendant’s Motion for Summary Judgment is Granted” It indicated receipt of Plaintiff’s Motion to Amend and indicated a hearing date of said motion It did not make reference to the ending of case 2009-CP-10-3010

The Judgment dated December 12, 2013 and filed December 8, 2013 references the “attached order” for formal Order Affirming Prior Order Granting Summary Judgment in Favor of Defendants dated December 12, 2013 and filed December 18, 2013

The lower court ruled that any action against the person or personal property of Alice must be brought by the personal representative Although the Omnibus Adult

Protection Act allows for third party reporting, it also requires a report to be filed within two days of the allegations of abuse. Typically, the alleged victim is alive when a report is filed. The Appellant filed no report. Respondent supports the fact that Alice Shaw-Baker died on February 25, 2009 and that Bessie Huckabee was appointed the personal representative based on nomination of Alice in her Last Will and Testament.

Plaintiffs filed a will contest of the Last Will and Testament and sought removal of the Personal Representative in a complaint filed in April 27, 2009 and have yet to seek determination in those matters. Bessie Huckabee is the current and only serving personal representative for the estate of Alice Shaw Baker.

ARGUMENTS

1 WHETHER SOUTH CAROLINA'S PUBLIC POLICY REGARDING PROTECTION OF THE ELDERLY ESTABLISHES THIRD PARTY STANDING FOR APPELLANT

Under the South Carolina Omnibus Adult Protection Act enacted in 1993, any third party who has reason to believe that abuse, neglect, or exploitation is occurring regarding a vulnerable adult may report the incident South Carolina Code Section 43-35-25(B). The sole purpose of the Act is to identify vulnerable adults who are subject to abuse and, if found, immediately act to remove said vulnerable adult from the abusive situation. The requirement is immediate, while the alleged vulnerable adult is allegedly being abused, not *several years after her death*. (emphasis added) Appellant cites *Williams-Garrett v. Murphy*, wherein the plaintiff seeks redress under the act for actions by a defendant who is alleged to have conspired to take valuable coins from the alleged vulnerable adult. 106 F Supp 2d 834 (2000). The Appellant fails to indicate that the plaintiff in *Williams-Garrett* is Ms. Williams-Garrett herself, who alleges that she was vulnerable at the time of the coin transactions. She made a contemporaneous claim to report a specific event. Here, the Appellant has made no contemporaneous report.

Under the Act, the lower circuit court lacks jurisdiction as the family court is the proper trier of fact. The Act explicitly and procedurally requires a report to be filed within two days of the allegations of abuse, neglect, or exploitation and any actions, petitions and hearings to follow the report must proceed in the family court. The Plaintiffs in this action have filed no reports and have offered no specific instances of abuse, neglect, or exploitation of a vulnerable adult.

The Appellant argues that third party standing has been found proper in *Amisub of South Carolina, Inc v. Passmore*. In *Passmore*, Ms Passmore was alive, the action was brought by the hospital to recover fees for services, and it was not brought under the South Carolina Omnibus Adult Protection Act 316 S C 112 (1994). Here, the Appellant's action is brought solely under the Omnibus Adult Protection Act. Under the Act, with proper authentication of facts and a contemporaneous report of abuse, the Appellant would have every privilege under the laws of South Carolina to report any incident of alleged elder abuse. Appellant never provided any contemporaneous report of abuse. Further, the complaint at bar was filed three years after Alice died. The personal representative has been appointed for over five years at this point. Appellant has had five years to be heard regarding validity of last will and has sat on her right to hearing while attempting every other avenue. The lower court has determined that Appellant has sat on her right to be heard on the issue of appointment of personal representative. The lower court has determined that the South Carolina Probate Code regarding personal representatives is in place to ensure that a single authority is charged with the duties and responsibilities of a decedent's estate.

The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once. 59 AmJur2d *Parties* § 35 (1987). The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it. 21 C J S *Courts* § 16 (1990). (See also *Bardoon Properties v. Eidolon Corporation, et al*, 326 S C 166 (1997).) Here, there is no third party standing for actions

in estates as the sole authority for said actions lies with the personal representative as codified under South Carolina Probate Code Sections 62-3-711 and 715 and therefore, Defendant's Grant of Summary Judgment should be upheld

2 WHETHER THE CIRCUIT COURT ERRED IN RULING THAT APPELLANT LACKED STANDING TO PURSUE DECEDENT'S SURVIVAL ACTIONS

The lower court did not err in its determination that Appellant lacks standing in any actions on behalf of Alice including survival actions. The personal representation is authorized to prosecute any causes of actions, arising, asserted, or brought under or by virtue of any statute or act of this State South Carolina Code Ann. Section 62-3-715. Said actions survive to the personal representative on behalf of the decedent. A personal representative has the same standing to sue as her decedent had immediately prior to death South Carolina Code Ann. Section 62-3-703(c). Here, the Appellant is not the court-appointed personal representative. Appellant does not have standing as a real representative and authority over estate actions brought on behalf of the decedent must be brought by the personal representative. Therefore, the lower court did not err in determining that Appellant lacks standing and therefore, Defendant's Grant of Summary Judgment should be upheld.

3 WHETHER THE CIRCUIT COURT'S CONSIDERATION OF MOTION FOR SUMMARY JUDGMENT AS TO RESPONDENT PETER KOUTEN WHEN HE DID NOT IDENTIFY HIMSELF AS A PARTY IN THE PLEADING AND DID NOT ADDRESS ANY ARGUMENTS INDIVIDUALLY

Rule 201, SCACR, states that an "appeal may be taken, as provided by law, from any final judgment, appealable order or decision." An issue cannot be raised for the first time on appeal, rather to be preserved for appellate review the issue must have been

raised to and ruled upon by the trial judge *S. C. Dep't of Trans v. First Carolina Corp of S C.*, 641 S E 2d 903, 372 S C 295 (2007) Where the record does not reflect that a point has been raised before the trial court, that point cannot be considered on appeal *Murphy v Hagan*, 275 S C 334, 271 S E (2d) 311 (1980) Appellant did not raise the issues of named plaintiff and/or respondent or whether individual issues had been addressed during the hearing nor did she raise them during the reconsideration hearing These issues should not be considered on appeal and therefore, Defendant's Grant of Summary Judgment should be upheld

The lower court did not err in considering Motion for Summary Judgment based on Respondent's identification as a party and addressing plaintiffs arguments individually Et al is defined as "and other persons" and is an appropriate form when drafting a pleading which lists several parties *Black's Law Dictionary* (7th Ed., 1999) Here, Respondent listed the first party of plaintiff and first party of respondent followed by etal Additionally, Respondent has no requirement to address any and all arguments of a plaintiff These issues were, not brought up at hearing in the lower court and therefore, Defendant's Grant of Summary Judgment should be upheld

4 WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT AS TO RESPONDENT'S BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD REGARDING GENUINE ISSUES OF MATERIAL FACT

The lower court did not err by granting summary judgment regarding genuine issues of material fact The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder *Bankers Trust of South Carolina v Benson*, 267 S C 152, 155, 226 S E 2d 703, 704 (1976) Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims

and defenses [that] have no factual basis " *Celotex Corp v Catrett*, 477 U S 317 (1986)

Here, the lower court determined that the Appellant lacked standing to bring the action and that any actions brought on behalf of a decedent must be brought by the court-appointed personal representative. In review of this threshold genuine issue of material fact, the lower court granted summary judgment, and therefore, Defendant's Grant of Summary Judgment should be upheld.

5 WHETHER THE CIRCUIT COURT ERRED BY ALLOWING PETER KOUTEN TO ACT AS COUNSEL FOR BESSIE HUCKABEE, KAY PASSAILAGUE SLADE, AND SANDRA BYRD WHEN HE WAS PREVIOUSLY COURT-APPOINTED ATTORNEY/GUARDIAN AD LITEM FOR THE DECEDENT

The lower court did not err on the issue of Respondents' counsel as the lower court made determination that Appellant lacks standing in any actions on behalf of Alice. The lower court granted summary judgment based on Appellant's lack of standing, and therefore, Defendant's Grant of Summary Judgment should be upheld.

Expense and possible delay inherent in any disqualification of counsel, with additional reasons, qualify as "substantial hardship" precluding disqualification where attorney's disqualification creates the loss of extensive knowledge of a case based upon a long-term relationship between the clients and counsel and substantial discovery conducted in the actual litigation. S C Appellate Court Rule 407, Rules of Prof. Conduct, Rule 3.7

The Sixth Amendment of the United States Constitution has been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Where the right to be assisted by counsel

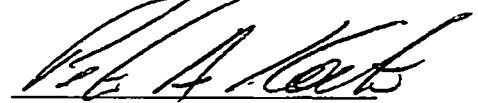
of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant. Further, because such a denial is not a trial error, meaning a constitutional error that occurs during presentation of a case to the jury, but a structural defect, in that the constitutional error affects the framework of the trial, the Supreme Court has held that the decision is not subject to a "harmless error" analysis.

Plaintiff cites the *Townsend v. Townsend* case as support for her claims. 323 S.C. 309 (1996). Although the *Townsend* case addresses issues regarding conflict of interest with a divorce lawyer representing a father and who had previously acted as guardian ad litem for the minor child, the court specifically indicates that this family court matter should be used "to clarify for the Bench and Bar some of the ethical and other responsibilities of attorney guardians ad litem in the context of *custody or support actions*" (emphasis added). The matter at issue is whether the prior representation did or could have revealed confidential information in the first representation that would be of significance in the second. Here, Respondent attorney never met with Alice privately on a one-on-one basis. Alice was under twenty-four hour care. There was no confidential information revealed to the attorney. There was no information revealed to attorney that was not provided to the probate court, there can be no conflict of interest along these grounds. Therefore, Defendant's Grant of Summary Judgment should be upheld.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the lower court and deny Appellant's appeal.

Respectfully submitted,



Peter A. Kouten
P O Box 340
Charleston, SC 29457
(843) 670-3919
Attorney for Respondent

September 6th, 2014

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

Honorable Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No 2014-000175
Case No 2012-CP-10-1332

Betty Fisher, as Real Representative for Alice Shaw-Baker, Appellant,

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Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd and Peter Kouten are the
Respondents

CERTIFICATE OF COUNSEL

RECEIVED

OCT 23 2014

SC Court of Appeals

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR

September 6, 2014


Peter A. Kouten
PO Box 340
Johns Island, SC 29455
843-789-9614

THE STATE OF SOUTH CAROLINA

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Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten are the Respondents.....Respondents

FINAL REPLY BRIEF OF APPELLANT

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

(Attorneys for Appellant)

RECEIVED

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SC Court of Appeals

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I.
APPELLANT'S REPLY TO BRIEF OF RESPONDENT KOUTEN

South Carolina considers the plight of the Elderly a top priority as evidenced by the strong statutory protections set forth in the Omnibus Adult Protection Act, and this appeal again raises the question of who has standing to prosecute an action for an Elderly victim after their death, here Alice Shaw Baker ("Ms. Shaw Baker" or the "decedent")

The Brief of Respondent Peter Kouten essentially argues that Ms. Shaw Baker loses her right to bring her Complaint (R . 17), because this action was not brought by the personal representative Yet, this issue of whether Ms Shaw Baker's estate should lose its opportunity to recoup its losses, when there is viable legal authority under the statutory authority in South Carolina Ann. Code § 15-5-90 for a "real representative" or the equitable principles governing "temporary representatives" of a Trust/ Estate, must be decided.¹

This action had to be brought by Appellant, in her capacity as Real Representative, or it would be have been lost by the bar of the statute of limitations. Appellant Betty Fisher , as Real Representative for Alice Shaw Baker ("Appellant")² contends that her action in bringing the underlying Complaint was the only way to safeguard Ms Shaw Baker's rights and to preserve the lawsuit.

¹ Respondent Peter Kouten failed to address these issues in his briefing, therefore Appellant contends that the legal principles in *First Union Nat Bank v FCVS Communications*, 321 S C 496, 469 S E 2d 429 (1996) apply. In *First Union*, the court held that if a Respondent fails to respond to an issue in the appellant's brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct. (See also 5 Am Jur 2d Appellate Review § 555, at 254 (1995))

² Appellant Betty Fisher is the daughter of Alice Shaw Baker's older sister, i.e. Alice Shaw-Baker's niece, Betty Fisher's daughter, Counsel Lisa Fisher, is Alice Shaw Baker's great niece.

As set forth herein, both procedurally and substantively, Respondent Peter Kouten has not in his reply brief, and can not based on the facts and law in this case, overcome the need for a third person, here Appellant, to preserve Alice Shaw Baker's causes of action against all Respondents

Moreover, as more fully developed, Respondents Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd have waived any objection to this appeal and have conceded to Appellant's arguments by failing to file any briefing in this matter.

Finally, the Brief of Respondent Kouten is fraught with erroneous legal conclusions, and factual statements, even to the point that the Brief itself identifies the wrong judge and wrong case number. Nor does it comply with Rule 267, SCACR, or even include Respondent's Bar no. as required by the court rules.³ For all of the reasons stated herein, Appellant requests that the court grant this appeal in its entirety.

J

II.

RESPONDENTS HUCKABEE, SLADE, AND BYRD'S FAILURE TO FILE THEIR OWN BRIEF AMOUNTS TO A CONFESSION THAT APPELLANT'S ARGUMENTS ARE CORRECT, THEREFORE THE APPEAL SHOULD BE AUTOMATICALLY GRANTED AS TO THESE RESPONDENTS

As set forth above, the *First Union Nat Bank* court held that a failure to respond to the issues in an Appellant's brief will be deemed a confession that the appellant's position is correct (See also 5 Am Jur 2d Appellate Review § 555, at 254 (1995).)

³ On the cover of the Appeal, Respondent Peter Kouten ("Respondent" or "Respondent Kouten") identifies the appeal as one from the Honorable Thomas L. Hughston, Jr, Circuit Court Judge. However, review of the record discloses that the judge who issued the orders was the Honorable J C Nicholson, Jr. The case number provided by Respondent Kouten is 2009-CP-10-3010, while this appeal relates to Circuit Court case no 2012-CP-10-1332

Here, Respondents Huckabee, Slade, and Byrd failed to file any brief addressing the issues raised by Appellant. They failed to adopt or join Respondent Kouten's brief pursuant to Rule 208(b)(6), SCACR.⁴ Respondent Kouten's argument in section 4 that the lower court determined that Appellant lacked standing is waived by these Respondents.

Appellant respectfully requests that this Court reverse the judgment as to these Respondents, Bessie Huckabee, Kay Passailague, and Sandra Byrd.

III.
RESPONDENT'S STATEMENT OF THE CASE IS "FACTUALLY
INACCURATE" AND INTENDS TO MISLEAD THIS COURT
AS EVIDENCED BY THE FAILURE TO REFERENCE THE RECORD
PURSUANT TO RULE 210 (C),
THEREFORE APPELLANT RESPECTFULLY REQUESTS THE COURT
STRIKE THE ENTIRETY OF THE "STATEMENT OF THE CASE".

Respondent Kouten continues to represent that he has the right to represent Respondents Huckabee, Slade and Byrd, and in so doing, he has set forth "factual

⁴ It cannot be disputed that the initial brief filed in this matter was on behalf of Respondent Peter Kouten only, his cover sheet specifically identifies Peter Kouten. There is no mention of any other respondent, nor could there be.

As set forth in the record, Respondent Peter Kouten obtained a consent order to withdraw from the case. While it is true that "Et al" is latin for "and others", there is nothing that supports the idea that it can be used for all other defendants without any information provided to the court. Therefore, even his contention that identification as "et al" is sufficient to advise this court that he was responding to the summary judgment motion (Respondent's brief, p. 11) cannot apply herein.

Appellant contends that failing to identify each individual defendant/respondent unfairly prejudices a party. These inconsistencies work mischief with the courts, as here, where a plaintiff can't determine who the moving parties are in Summary Judgment proceedings.

However, Rule 11(a), SCRCP, provides that an attorney sign not *his* paper, but a paper of a party. Therefore, implicitly it provides he must identify the party he is representing. Respondent Kouten failed to take this action, and it has caused a substantial hardship on Appellant.

statements" that are false, incomplete and misleading. (See South Carolina Rules of Professional Conduct, Rule 3.3) This was evident in the lower court as well, where he continued to represent Respondents even after the consent order substituting in new counsel (R. 13) Still he argued at the hearing and continues to appear on behalf of Respondents.

In the Statement of the Case, Respondent fails to reference the record and leaves important information out (e.g. Alice Shaw Baker revoked the Will that Respondents claim an interest in) Moreover, the information on p. 5 of the Brief of Respondent concerns disputed issues related to the Will Contest which have nothing to do with this Appeal.

Rule 208 (b) (4), SCACR, provides that there shall be references to the record in the parties' briefs:

"The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210 (c)] to support the salient facts alleged."

In light of the fact that a Respondent is entitled to set forth its own "statement of the case" (Rule 208(b)(2)), it must comply with the rules regarding the record. However, pursuant to Rule 210 (c), SCACR, "The Record shall not, however, include matter which was not presented to the lower court or tribunal."

Here, Respondent Kouten makes claims that are not correct, not in the record, not referenced in the brief, nor sought by way of designation of the record, therefore Appellant prays that the court strike Respondent's Statement of the Case and that the court treat Respondent's brief, as if he did not include any statement of the case. Therefore,

pursuant to Rule 208(b)(2), Respondent " shall be bound by the matters stated or alleged in appellant's statement of the case."⁵

IV.

THIRD PARTY STANDING UNDER THE OMNIBUS ADULT PROTECTION ACT, CASE LAW, AND STATUTORY LAW PROVIDES RELIEF FOR THIRD PARTY STANDING.

Respondent's reading of the Omnibus Adult Protection Act is too narrow and fails to follow the reasoning in the cases cited by Appellant.

In citing to the court's decision in *Amisub of South Carolina, Inc v Passmore*, 316 S.C. 112, 447 S.E 2d 207 (1994), Respondent's conclude that Appellant had to bring a report contemporaneously with the abuse. The code that the *Amisub* case dealt with has been repealed, but the case still stands for the proposition that a third party may sue on behalf of a victim.

Further, Respondent's conclusion concerning the decision in *Williams-Garrett v Murphy*, 106 F.Supp.2d 834 (2000) is without merit. There is nothing in the case, in the code, or in the analysis of the law that indicates that a "contemporaneous claim to report" is mandated, nor that the victim need be alive, to bring a civil action. Although Respondent claims specific and explicit procedures to make reports, the cases have no such holding or explicit requirement with regard to a private cause of action.

Appellant contends that the cause of action relates to *essentially* a negligence per se/reckless cause of action under South Carolina Ann. Code § 43-35-3. The statutes that apply in this instance are not limited, as set forth by Respondent Kouten. South Carolina

⁵ For clarity, Appellant's statement of case is divided into two parts: Statement of the Case and Statement of Facts.

Ann. Code 43-35-85 , specifically references the "death" of a victim. Even though South Carolina Ann. Code § 43-35-80, provides specifically that an attorney general may bring an action, it also includes language that

"Notwithstanding any regulatory or administrative penalty that may be assessed and in addition to a private civil cause of action that may be brought against a person or facility based on an action or failure to act that otherwise constitutes abuse, neglect, or exploitation under this chapter." (Emphasis added)

Therefore, the legislature specifically anticipated that parties could bring civil actions. Under South Carolina Ann. Code §43-35-45 (g), an "interested person" has the ability to bring a motion to seek an investigation. Therefore, family involvement was anticipated, and Appellant contends there are no impediments to her bringing this cause of action on behalf of Alice Shaw Baker.

Respondent states that:

"Appellant has had five years to be heard regarding validity of [sic] last will and has sat on her right to hearing while attempting every other avenue. The lower court has determined that Appellant has sat on her right to be heard on the issue of appointment of personal representative. The lower court has determined that the South Carolina Probate Code regarding personal representatives is in place to ensure that a single authority is charged with the duties and responsibilities of a decedent's estate." (Respondent's brief, p 9)

However, the trial court made none of these findings, and could not make these findings. Appellant filed a proper Complaint seeking the removal of Huckabee as personal representative, and all of the other relief in the Will contest action (R 17). This was done based on Respondent Huckabee's improper activities and lack of statutory notice which led to her improper appointment as informal personal representative.

Information obtained after the initiation of the Complaint led to discovery that she is holding over \$16,000.00 of Ms. Shaw Baker's money without the bond ordered by the court⁶ and without informing the court (or any parties) in any court filings. (R. 132, prg. 50).

All of these issues will be resolved after trial, yet the important issues on appeal must be decided to ensure fairness and avoid prejudice. The underlying principles governing Due process under the South Carolina and United States Constitutions preclude any prejudicial determination that Appellant has lost her rights to proper findings, because she availed herself to appellate review¹ (See also, U S Const Amends. IV and XIV, § 1 and S C. Const. Art. I, § 3.)

Respondent argues that this case involves a "real party in interest" (Respondent's Brief, p 9), however Appellant is not bringing this in her name, she is bringing it on behalf of Alice Shaw Baker. There can be no doubt that Alice Shaw-Baker had a "right to relief" (See *Bardoon Properties v Eidolon Corporation*, 326 S C 166). So Respondent's argument fails. This action is to ensure that Ms. Shaw Baker's case is not subject to the statute of limitations. As outlined in the expert and lay affidavits filed in this case, Alice Shaw Baker was subject to harm during her life, including the harm caused by Respondent Kouten's unethical representation. (R. 88-135) Dismissal of this action would prejudice Alice Shaw Baker's estate.

Respondent does not even address the issue of the "real representative" or "temporary representative" raised in this appeal. Instead, he relies on South Carolina Code Ann Sections 62-3-711, 62-3-715, and 62-3-703(c) governing personal

⁶ See S.C Code Ann. § 62-3-605, S C Code Ann Section 8-3-60 [unlawful for individual to take public office without bond where required] (R. 252)

representatives, which has nothing to do with third party standing. (See Respondent's Brief, § 2, p. 10)

Since Respondent fails to address the legal argument outlined in Brief of Appellant, pp. 20-29, the court should follow the legal authority in *First Union Nat Bank, supra*, and rule that Appellant's argument are deemed correct.

**V.
APPELLANT RAISED THE ISSUE OF RESPONDENT KOUTEN'S FAILURE TO
IDENTIFY HIMSELF THROUGHOUT THE HEARINGS AND PLEADINGS,
THUS CONTEMPLATING RESPONDENT'S WAIVER.**

Respondent contends that "Appellant did not raise the issues of named plaintiff [sic, should be "defendant"] and/or respondent or whether individual issues had been addressed during the hearing nor did she raise them during the reconsideration hearing." (Brief of Respondnet, p 11)

Contrary to Respondent's assertion, Appellant raised the issue at the beginning of her Return, footnote 3, (R 74)⁷ Respondent's Summary Judgment motion itself did not address the issues of legal malpractice, nor identify Respondent Kouten as one of the parties, so Reversal is mandated (R. 43) Also, as the case went forward, the original grounds for bringing the Motion for Summary Judgment changed, the issue of standing was not raised in the moving papers (R. 43) The issue of the appropriate parties continued to be an issue, as Respondent Kouten filed a Supplemental Memorandum Supporting the motion for Summary Judgment This document was filed individually by Peter Kouten as Defendant, not the other Respondents (R. 156)

⁷ See R 372

In Appellant's *Motion to Alter, Amend, Reconsider and Vacate Order of May 8, 2013*, (R. 162, 175, 176), Appellant specifically listed as grounds noticed that she was seeking "reconsideration" based on the trial court's failure to "rule on plaintiff's objections to Defendant's Motion," improper reliance on argument, and if waiver occurred due to defendants/respondents failure to set forth the parties' names in bringing said motions and lack of reference to causes of actions. Also, Appellant raised the issue of whether Respondent Kouten waived the issue of standing by failing to address the claims for Legal Malpractice and Breach of Fiduciary Duty. Since many of the pleadings were referenced in the "singular", Appellant contends *all* of the respondents waived the issue of standing. (R. 176)⁸ This issue was properly preserved.

The court in *Coward Hund Construction Co , Inc v Ball Corp.*, 336 S C. 1, 518 S E.2d 56, 58 (1999) explained

"Once the issue has been properly raised by a Rule 59 (e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised "

Additionally, James F. Flanagan explains in *South Carolina Civil Procedure* 475 (2nd ed. 1996):

"Lawyers cannot force a trial Judge to address a disputed issue "

Finally, as outlined in *Pye v. Estate of Fox*, 369 S C. 555, 563, 633 S.E. 2d 505, 509 (2006)

"The Supreme Court identifies two ways to preserve the issue: a ruling by the trial judge or a post trial motion."

⁸ The issue of representation and Respondent Kouten's appearance at the hearing on behalf of Huckabee, Slade and Byrd was also raised in *Objections and Opposition by Plaintiff Betty Fisher to Notice of Appearance filed by Counsel W Westbrook Wills on August 6, 2013* (R 216)

Therefore, the grant of Summary Judgment as to all Respondents must be reversed.

VI.

RESPONDENT'S ARGUMENTS REGARDING HIS DUTY TO ALICE SHAW BAKER AS COURT APPOINTED ATTORNEY/GUARDIAN AD LITEM ARE INCORRECT, AND HIS CONTINUED REPRESENTATION VIOLATED ACCEPTED ETHICAL STANDARDS.

Respondent Kouten claims "substantial hardship" for the other Respondents if he was disqualified, but ignores the harm suffered by Alice Shaw Baker. Several ethical opinions have addressed similar issues related to a guardian ad litem for children, and the inappropriateness of dual or later representation. (See S C. Ethics Advisory Opinion 09-12 [lawyer who previously served as the guardian *ad litem* for three minor children in an abuse and neglect action should not represent the custodial parent/grandparent in a later action to enforce or modify child support]; See also Ethics Advisory Opinion 08-04 [guardian *ad litem* could not also represent the child; also, see Ethics Advisory Opinion 04-08 [guardian *ad litem* could not later represent a non- custodial parent in a child support reduction action]).

The rationale supporting these ethical considerations can not be limited to children. Alice Shaw Baker was in the most vulnerable position in her life when Respondent Kouten was appointed attorney/guardian ad litem, his continued representation of individuals who harmed Ms. Shaw Baker can not be defended

Contrary to Respondent Kouten's claims, the court in *Townsend v Townsend*, 323 S C. 309, 474 S E 2d 424 (1996) recognized the importance of these principles. The *Townsend* court itself raised the issue relating to the conflict. Respondent Kouten states

that "the matter at issue is whether the prior representation did or could have revealed confidential information in the first representation that would be of significance in the second." The *Townsend* court explained

"...to allow a guardian ad litem to represent a parent in a proceeding substantially related to the action for custody or visitation would **completely undermine the trust and confidence necessary to an informed recommendation by the guardian ad litem.**" (Emphasis added)

This same reasoning has to be applied in Alice Shaw-Baker's case. The same duty that the court has to remove a guardian ad litem for a minor should apply to a vulnerable adult. Respondent Kouten claims that he never met with "Alice" privately on a one on one basis,⁹ however this is not controlling. The attorney client privilege may extend to information beyond the specific communication between lawyer and client. In *State v. Adams*, 277 S.C. 115, 283 S.E 2d 582 (1981), overruled on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E 2d 315 (1991), the prosecution in a criminal case examined the defendant's former counsel as to the lawyer's opinion of whether a confession had been voluntarily given. The opinion was based in part upon the lawyer's observation of the defendant during a confidential meeting. The court held that eliciting an opinion based upon the lawyer's observation of the client during a confidential conversation was a violation of the attorney-client privilege. The court held.

"We believe that the spirit of this policy dictates that not only is the conversation protected but the entire setting of the confidential conference must be protected as well. To **lend privilege to the words spoken but to allow disclosure of professional impressions drawn from the**

⁹ For purposes of this appeal, Appellant repeats Respondent Kouten's claims, however he failed to designate any part of the record and/or present any admissible evidence supporting this claim. Therefore, Appellant continues to object to his failure to reference admissible evidence

manner of their delivery all but destroys the substance of the privilege " (*Adams*, at 586, emphasis added)

The courts have held that the attorney-client privilege extends beyond the death of the client (See *State v Doster*, 276 S C. 647, 284 S E.2d 218 (1981), *South Carolina State Highway Dept v Booker*, 260 S C. 245, 195 S E 2d 615 (1973).)

So under principles governing attorney client privilege, Respondent Kouten's claims that the communications were revealed to the court and third parties do not relieve him of his duties to preserve Alice Shaw Baker's confidences. Rather, they may even support Ms. Shaw Baker's legal malpractice cause of action against Respondent, and his failure to satisfy all the duties of appointed counsel.

Finally, it is well settled that the Sixth Amendment of the United States Constitution does not apply to civil actions (See *Turner v Rogers*, 387 S C. 142 (2011)), so Respondent Kouten's reliance on this authority has no place in this case. Respondent should not now, or ever have represented the other Respondents

VII. CONCLUSION

The real purpose of a case can sometimes be lost in cases, and real life can often bring the purpose into perspective. For example, Someone once asked, Why did you help that person? The reply was that they were once a baby, and someone loved them.

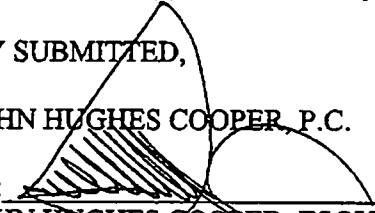
In law, the principles of third party standing may not be so simple, but that purpose is bolstered by the added commitment of Constitutional principles governing Equal Protection and Due Process (See U S. Const Amends. IV and XIV, § 1 and S C. Const Art 1, § 3) We also have appellate review to correct errors in trial court decisions and orders Appellant should not be derided for seeking review on behalf of her Aunt, rather this case epitomizes the need for "real representatives" and "temporary representatives" to

seek recovery on behalf of their loved one when there are allegations, as here, of serious elder abuse, neglect, and breach of duty by those with access to the vulnerable.

While Alice Shaw Baker has died, this litigation necessarily continues. This appeal was filed to vindicate Alice Shaw Baker's rights, and in pursuit of that goal, Appellant respectfully prays that the court grant this appeal in its entirety.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro Hac Vice

c/o JOHN HUGHES COOPER, P.C.

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

August 29, 2014

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175
Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Appellant

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

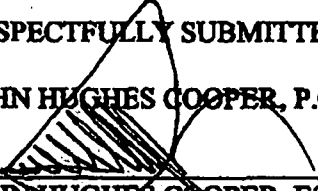
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

October 17, 2014

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

843-883-9099; fax 843-883-9335

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175
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Betty Fisher., as Real Representative
for Alice Shaw-Baker.....Appellant

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

PROOF OF SERVICE

I certify that I have served the CERTIFICATE OF COUNSEL on the following counsel
and parties by depositing a copy of it in the United States Mail, postage prepaid, on October ²⁰~~17~~,
2014 addressed as follows:

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OCT 22 2014

SC Court of Appeals

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340
John's Island, SC 29457

(Attorney Pro Se and Attorney for Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

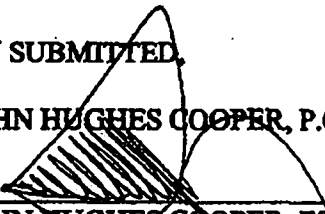
W. Westbrook Wills III, Esquire
38 Broad Street Ste. 200
Charleston, SC 29401

(Attorney for Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd)

²⁰
October 17, 2014

RESPECTFULLY SUBMITTED.

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185986

1476 Ben Sawyer Blvd. Ste. 7

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA

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Betty Fisher, as Real Representative
for Alice Shaw-Baker.....Appellant

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Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

APPELLANT'S PETITION FOR REHEARING
REGARDING OPINION NO. 5371
HEARD OCTOBER 14, 2015 – FILED DECEMBER 9, 2015

JOHN HUGHES COOPER, ESQUIRE
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335
(Attorneys for Appellant)

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SC Court of Appeals

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(I), SCACR,¹ Appellant Betty Fisher, As Real Representative for Alice Shaw Baker, Decedent ("Appellant") respectfully petitions this Court for rehearing of Opinion No. 5371 ("Opinion") filed on December 9, 2015

The policy for rehearing has been discussed by scholars in the past. One wrote, "The decision to rehear a case is an equitable decision with the goal of attaining justice for the particular litigants involved, which is precisely what a legal system is supposed to do." (Wasserstrom, *Equity: The Case of an Equitable Decision Procedure* in Readings in Philosophy of Law 118 (1984).)

As set forth herein, by its Opinion, this Court has denied justice, not merely for Alice Shaw Baker, but for all family members justified to fight against the tyranny of those guilty of Elder Abuse. In so doing, this Court ignores issues that were properly briefed and made part of the record and which support the underlying principles supporting the interpretation of "real representative" or more importantly, "temporary trustee" standing to proceed with Alice Shaw Baker's cause of actions.²

¹ Rule 221(a) states in pertinent part:
"Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court."

² Appellant specifically addresses the issue of objections and issues raised in the pleadings and in the motion to alter, amend requesting rulings on 1) equitable standing and 2) waiver of argument by Peter Kouten and 3) causes of action are that are more than mere fraud allegations, and contrary to the Court's Opinion can still be pursued. Further, she objects to the Court's characterization of Peter Kouten as "pro se". He is the only attorney who represented the other Respondents, by way of pleadings and appearances.

The Opinion affirming the circuit court's grant of summary judgment in favor of Respondents and holding that a "real representative does not have standing to bring personal actions on behalf of a decedent" (Opinion, p. 9) victimizes family members who in their attempt to vindicate the rights of their loved ones are subjected to the same shackles that imprisoned their beloved family members, here Alice Shaw Baker, the handcuffs of deceit which caused her to fall prey to these perpetrators, charlatans and betrayers. The Court's opinion now essentially holds them immune, because they were cunning enough to deprive family of standing by being named "personal representative"! Now, they have permission to use their positions to seduce wealthy women, like Alice to bestow on themselves their estates.

South Carolina's laws establish a far-reaching statutory framework to help the Elderly, but the Court's interpretation of the standing statutes lead to the disparate result of undermining this legislative intent which developed a private right of action for the vulnerable and Elderly.

This Court's decision does violence to these laws which will be undermined in all cases where the deceiver gains title as "personal representative." The law becomes of no effect, and this public Opinion instructs those individuals, so dastardly in their own right that they have no qualms about stealing from the Elderly, of the most convenient manner to interfere any family intervention and deny them a fair playing field in these Courts.

Appellant can not believe that this is this Court's intention to create such a vacuum in the law. Instead, Appellant uses this petition as an opportunity to demonstrate that the Court overlooked and misapprehended the law in its entirety, but most specifically in that:

- 1) The Court misapprehended or overlooked Appellant's legal analysis and interpretation of the questions which this case presented as to:
 - a) Statutory construction of the codes related to "real representative";
 - b) Complementary methods in the law which mandate a third party beneficiaries ability to act in the stead of the personal representative;

Appellant also addresses the issues in the Opinion that claim she failed to preserve the issues of equitable issues of trust law and Respondent Kouten's waiver. As will be shown, these issues were preserved and it appears that the court merely overlooked Appellant's reference in the record.

As set forth herein, Rehearing is proper and is the only way to ensure proper administration of the law.

IMPORTANT PORTIONS OF OPINION

The Court ruled in its Opinion:

"[B]ased on the legislative history of the survivability statute, we find the "real representative"—a decedent's intestate heir or devisee of his real property—is a remnant of the 1892 Act and only continued to have standing after the 1905 amendment in survival actions involving trespass or injury to the decedent's real estate. In addition to the legislative history of the survivability statute, we find the current version of the South Carolina Probate Code lends support to our conclusion that a real representative has no role in a survival suit for injuries to the decedent's person. In 1986, the General Assembly enacted a modified version of the Uniform Probate Code that modernized and made sweeping changes to the state's antiquated probate law on which the survivability statute was based. Act No. 539, 1986 S.C. Acts 3446 (codified as amended at S.C.Code Ann. §§ 62-1-100 through -7-1106 (Supp.2014)); see also generally S. Alan Merlin, *Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law*, 38 S.C. L. REV. 611 (1987) (discussing the substantive changes

made to South Carolina probate law). Under the modern Probate Code, the personal representative is the central figure responsible for the orderly management of a decedent's estate."

"The real representative, on the other hand, is mentioned nowhere in the modern Probate Code. Nevertheless, in the instant case, Fisher argues specific language in Duke supports her contention that she may bring a survival action for any cause of action as Shaw-Baker's real representative.

As discussed above, although Fisher desires to bring personal causes of action on behalf of Shaw-Baker, we find these actions may only be properly pursued by the personal representative. See Bennett, 97 S.C. at 29, 81 S.E. at 189. Based on the foregoing, we hold the circuit court properly granted Respondents' motion for summary judgment because Fisher lacked standing to bring a survival action against them as Shaw-Baker's real representative.

II. Unreserved Issues

Fisher argues Kouten waived the issue of standing by failing to identify himself as a moving party in his motion for summary judgment. Fisher also asserts she has standing to bring the survival action under equitable principles of trust law. We find these issues are not preserved for appellate review because they were not properly raised to and ruled upon by the circuit court. See *Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct.App.2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court."); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating a party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment).

III. Remaining Issues

Because our finding that Fisher lacked standing is dispositive in this case, we decline to address the remaining issues on appeal. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive)."

STANDARD OF REVIEW FOR REHEARING

Rehearing is warranted in cases where the Court has overlooked or misapprehended an argument. (See *Kennedy v. S.C. Retirement System*, 3349 S.C. 531, 564 S.E. 2d 322 (2001).)

Also, Appellant contends that if the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." (See *Covar v. Sallat*, 22 S.C. 265, 272 (1885).) A rehearing is also proper when a court has inadvertently overlooked exceptions. (See *Covar, supra*, at 272)

Finally, the principles behind the concept of rehearing were discussed in the broad constitutional context in the United States Supreme Court decision, in *Flynn v. United States*, 348 U.S. 956, 99 L.Ed. 1298, 1299 (1955) which provides: "The right to [a petition for rehearing] is not to be deemed an empty formality..."

Appellant respectfully pray that the Court grant this request for rehearing for the reason's more fully set forth herein:

**I. THE COURT OVERLOOKED AND MISAPPREHENDED
THE LAW GOVERNING REAL REPRESENTATIVES AND
THE ARGUMENTS SUPPORTING COMPANION
STANDING PRINCIPLES**

The Court's Opinion has segregated the equitable principles of standing from the statutory standing issues, and while this is often appropriate because statutory standing is obvious and controlling, here, it undermines the principles sought by Appellant to allow her to bring this action on behalf of Alice Shaw-Baker. Appellant's pleadings specifically raises the issue of equity in her discussion of the Vulnerable Adults under the Omnibus Adult Protection Act, South Carolina Ann. Code § 43-35-5 et seq. ("Omnibus Act") which has the very purpose to protect the Vulnerable and Elderly. The Code contemplates "civil actions" and yet this code is rendered meaningless, if the individuals who take advantage of the elderly are made "personal representatives". This is further supported by the principles governing equitable standing supporting the

statutory scheme. Therefore, the framework for the "Omnibus Act", trust law, and the concept of "real representative" are complementary and not exclusive.³

A. The Court's Opinion Undermines Public Policy Law Supporting Standing for Situations Involving Elder Abuse.

Moreover, law governing standing also contemplates public policy issues that recognize standing. This Court has recognized that "standing is not inflexible." (*Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007).) In fact, the Court has ruled that "standing may be conferred upon a party when an issue is of such importance as to require its resolution for future guidance." (*Id.*) The court did explain that "[w]hether an issue of public importance exists necessitates a cautious balancing of the competing interests involved." (*ATC S. Inc. v. Charleston Cty*, 380 S.C. 195, 198, 669 S.E. 2d at 341 (2008), emphasis added).

The Court went on to explain "[t]he key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *Id.* at 199, 669 S.E. 2d at 341

Therefore, by balancing the need to encourage protection of the elderly, denying those with unclean hands the benefit of protection by unintended immunization, and

³ *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) ("Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable.") Equitable law regarding trust standing is not undone by the definition of a "personal representative" or "real representative."

using a common sense reading of "real representative"⁴ –the public importance supporting standing is obvious for the protection of the elderly.

B. The Amendment to § 15-5-90 was not Limiting but a Liberal Construction Supporting Standing.

The Opinion outlined all of the prior law regarding the archaic definition of "real representative,"⁵ but the language amending § 15-5-90 raises the most simple analysis of the code. It is settled that the statute has survived with little change to the present day:

"Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding. (S.C. Code Ann. § 15-5-90 (1976) (emphasis added)."

The Court's interpretation essentially excludes the benefit of the amendment. The plain language supports Appellant's reasoning that either the causes of action for real property and injuries to the person or the personal property survive to both "personal" or "real representative". There is nothing in the statute which precludes the "real representative" from bringing the causes of action. When the legislature

⁴ When the statute's terms are clear and unambiguous, there is no room for an alternate construction, and courts must apply them according to their literal meaning. (*See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998).) Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative. (*Layne v. International Bhd. of Elec. Workers*, 271 S.C. 346, 247 S.E.2d 346 (1978).)

⁵ Appellant contends that summary judgment is also improper, because this area of law has not been developed (and may be construed as a "novel theory". (See *Schmidt v. Courtney and Kemper Sports*, 357 S.C. 310, 324, 592 S.E.2d 326, 334-35 (2003) [error to grant summary judgment without an opportunity for full and fair discovery].)

changed the code to allow a personal representative to bring the causes of action, it could have changed the code (as it apparently did in the broad changes in Probate) to exclude a real representative from bringing the action. The legislature is presumed to know the law, and their decision not to exclude the term creates an explicit inference that they wanted a broad interpretation of standing.⁶ Therefore, the changes in probate are not instructive in this case, these changes deal with the issues of the estate, not where there is a dispute concerning the harm suffered during the life of a vulnerable adult.

C. Equitable Law Governing Standing Complements Statute

The legal authority outlined in Appellant's briefing related to temporary trustees is controlling in that context. The court in *Bailes v. Southern Railway Co. Et al.*, 227 S.C. 176, 87 S.E. 2d 481 (1955) explained that when a fiduciary, here dispute personal representative Huckabee refuses to bring an action, **the courts have upheld the right of the beneficiary to begin such action.**" (Emphasis added; see also Bogert, *The Law of Trust and Trustees*, § 869, ch. 41, "Beneficiary and Trustee—Remedies under Trusts", p. 118-119) This is not a separate argument, it is merely support for the very arguments that Appellant raised, i.e. she was the only person to bring these causes of action to preserve Alice Shaw Baker's causes of action and to avoid any bar to statute of limitations. Any problems with the complaint can be remedied by motions to amend, rather than dismissal. (See *Allen v. Oil Co.*, 59, S.C. 571 (1901).)

⁶ See *Duvall v. South Carolina Budget and Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the law.")

D. Standing Was Not Raised by Respondent's Original Motion and Should have been Deemed Waived

There are several issues which the Court failed to recognize in Appellant's briefing and the Record. Since this Court reviews the case de novo regarding a question of law, (*Lambries v. Saluda Ct. Council*, 409 S.C. 1, 7, 760 S.E. 2d 785, 788 (2014)), full consideration of all of the issues including waiver should also be considered.

Appellant informed the court that Respondent Kouten failed to forth any admissible evidence in his pleadings, and for that reason his motion should have been denied. Appellant contends once he failed to raise the issue of standing in the original motion, he waived the issue with regard to any subsequent pleadings. (See *We Sav Financial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994) [standing issue may be waived].)

This coupled with the fact that he used the singular and plural forms of Defendants/ Respondents in the pleadings means that Attorney Kouten was playing fast and loose with the representations to try and avoid waiver.⁷

Even had he raised the issue of standing, Appellant argues that the law supports her in that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Appellant contends that

⁷ There wasn't even a reference to Respondents Passailague, Slade and Byrd in the pleadings. The prayer in the *Supplemental Memorandum* (R. 261) was also referenced in the singular. The documents did not raise any arguments opposing the Legal Malpractice cause of action against Respondent Kouten. (R. 43, 156, 258) (See *Valentine v. Davis*, 319 S.C. 169, 460 S.E. 2d 218 (1995) [can not add names to caption because it interferes with orderly administration of legal system])

this applies to standing as well, whether by statute, equitable law, or waiver. (See *Fabian v. Lindsey* 765 SE 2d 132 (2014) [standing found allowing third party beneficiaries ability to bring legal malpractice action]).⁸

For judicial economy, Appellant is referencing where she raised the issue of waiver and/or brought issues before the court.

- On page 74 of the Record, fn. 3, Appellant referenced Respondent Kouten's failure to outline his capacity.
- On p. 135 of the record, Respondent Kouten and the other Respondents did not bring the motion for summary judgment based on standing.
- He cited no authority for the argument that Appellant had no standing. Arguments are not evidence. (R. T. 174, citing *Trivelas v. S.C. Dept. of Transportation* , 348 S.C. 125, 141, 558 S.E. 2d 271, 279 (2001).)
- Appellant argument that a third party can sue an attorney when he misleads individuals regarding their right to estate inheritance. (R. 151, see *Holz v. Minyard*, 304 S.C. 225, 403 S.E. 2d 634 (1991) and *Jenkins v. Wheeler* 316 S.E. 2d 354, [estate heir allowed to sue attorney in tort when attorney failed to explain conflict of interest].) (R. 152)
- Appellant continued to contend that the court ignored the motion to remove Kouten. (R. 155)
- Kouten did not bring up the issue of Appellant's standing until his supplementary pleading filed on December 20, 2012. (R. 157)

⁸ The Kentucky Supreme Court found that an appellate court cannot , sua sponte, resolve an appeal based on lack of standing, when it was not raised below. Appellant contends standing was not raised in the original papers, was not raised by some of the parties as the disingenuous presentation of the pleadings went from singular to plural. (See *Harrison v. Leach*, 323 S.W. 3d 702 (2010).)

Therefore, Appellant contends that he waived the issue of standing and in fact brought a different motion which the court should not have considered.

- R. 163, Appellant specifically raised the issue of Kouten's waiver to set forth the parties names in bringing said motions and lack of reference to cause of actions in subsection 7. (R. 164)
- Appellant again brought up the issue of motion to remove in the motion to amend. (R. 170, fn. 5)
- Appellant outlined that the circuit court failed to address the issues in the case. (R. 171)
- Appellant notes that the circuit court failed to rule on her request re: Kouten and his failure to reference the causes of action for Legal Malpractice. (R. 176) Appellant explained that it was necessary to determine whether any of the defendants waived the issue of standing.
- Appellant further argued and cited to authority that a third party has authority to bring an action on behalf of a trust which has been described by treatises as "temporary representative of the trust" (see *Bailes v. Southern Railway Co.* 227 S.C. 176 (1955).)
- Appellant specifically requested that the court consider her motions and rule on the motions. (R. 231)
- Respondent Kouten stated that he was representing all defendants after the notice of association was filed. (R. 372)
- Appellant questioned Kouten's involvement in the case from his first pleadings. (R. 373)

By raising these issues, Appellant preserved it for the court's consideration. This coupled with the court's obligation to review the case de novo, Appellant requests rehearing on the matter. The Court's opinion will produce confusion as to the ability of family and beneficiaries to act on behalf of victims of Elder Abuse, leading to untoward consequences.

Additionally, the Court's opinion overlooks and misapprehends the other mandates for refusal, Peter Kouten's waiver and his continued representation of Respondents contrary to his ethical duties and his representation to the court.

The Court's opinion will allow Attorney Kouten to stand as an ambiguous being, never responsible for his own actions and never culpable for his own wrongs. The Court's opinion identifies him as "pro se" on the cover sheet of the opinion, however he is the only person who filed pleadings on behalf of Respondents, the only person who argued at the hearings, and the only person who argued before this court.

Yet, he never acted on his own behalf. Still, by this Court's opinion, he gained all of the benefits without requiring clarity for the record. The court will not allow a plaintiff to sue without fully disclosing the names of the litigants? However, Respondent can trade singular and plural identifications, never addressing any arguments in the court, and still this Court grants *him* relief.

This amounts to justice denied for Alice Shaw Baker and directly bears on this erroneous decision, smacking a death blow to the families who seek justice for their loved ones.

//

E. If the Court Finds Standing, Appellant Will be Able to Pursue the Causes of Action for Elder Abuse

Finally, in the Opinion the court stated:

"We note that some, if not all, of Fisher's causes of action include allegations of fraud and deceit, both of which are well-recognized common law exceptions to the survivability statute. Ferguson, 349 S.C. at 564, 564 S.E.2d at 97. Therefore, even if Fisher had standing, she could not bring these actions on Shaw-Baker's behalf under the statute"

The court's conclusion that Appellant would not be able to bring the actions because they were based on fraud and deceit is not accurate. The allegations can also raise negligence causes of action or actions for neglect under the elder abuse statutory scheme, therefore, if the court found standing, Appellant could pursue the action on those grounds.

CONCLUSION

Justice Earl Warren once stated that "It is the spirit and not the form of law that keeps justice alive. The beginning of Justice is the capacity to generalize and make objective one's private sense of wrong."

Alice Shaw-Baker deserves justice. She is loved. The only person willing to stand up for her, here Betty Fisher, is being denied the opportunity to seek damages for her injuries, not because there is no evidence of wrongdoing, breach of fiduciary duty, legal malpractice, etc. by these Respondents, but because Respondents hide behind perceived argument of standing. (See R. p. 111 -121 declaration of Expert Witnesses)

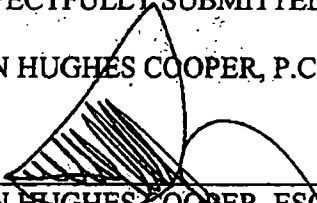
Moreover, the other issues raised in the pleadings, Respondent Kouten's waiver and equitable standing could not be waived as outlined above, because they

were raised in the lower court and brought to the court's attention in Appellant's motion to amend and briefing.

The wrong Alice Shaw Baker suffered is the wrong all of the elderly will suffer if the court views standing so narrowly that family can not assert their loved one's rights.

FOR ALL OF THESE REASONS, Appellants respectfully seek an Order granting rehearing and reverse all prior orders and allow Appellant to prosecute her Complaint as real representative on behalf of Alice Shaw Baker.

RESPECTFULLY SUBMITTED,
JOHN HUGHES COOPER, P.C.

By: 
JOHN HUGHES COOPER, ESQUIRE
Federal Court ID 298
South Carolina Bar 1387
State Bar of Georgia 185986
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
shiplaw@jhcooper.com
843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE
Pro Hac Vice
c/o JOHN HUGHES COOPER, P.C.
1476 Ben Sawyer Blvd. Ste. 7
Mount Pleasant, SC 29464
843-883-9099; fax 843-883-9335

ATTORNEYS FOR PLAINTIFF

December 22, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

DEC 23 2015

SC Court of Appeals

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-000175

Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
For Alice Shaw-Baker.....Appellant
v.

BESSIE HUCKABEE, KAY PASSAILAGUE SLADE,
SANDRA BYRD, and PETER KOUTEN, and DOES 1 through 100, Defendants,

Of Whom BESSIE HUCKABEE, KAY PASSAILAGUE SLADE,
SANDRA BYRD, and PETER KOUTEN are.....Respondents

PROOF OF SERVICE

I certify that on December 23, 2015, I served a copy of Appellant's Petition for

Rehearing on the Respondents and interested parties by depositing same in the United States

Mail, postage prepaid, addressed as follows:

Peter A. Kouten, Esquire
Kouten Law Firm, LLC
P.O. Box 340a
Johns Island, SC 29457
(Attorney for Respondent Peter A. Kouten)

W. Westbrook Wills, III, Esquire
P.O. Box 822
Folly Beach, SC 29439

December 23, 2015

RESPECTFULLY SUBMITTED:

JOHN HUGHES COOPER, P.C.

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

South Carolina Bar 1387

State Bar of Georgia 185586

1476 Ben Sawyer Blvd., Suite 7

Mt. Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE

Pro hac vice

c/o John Hughes Cooper, P.C.

1476 Ben Sawyer Blvd., Suite 7

Mt. Pleasant, SC 29464

883-9099; fax 843-883-9335

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA

COUNTY OF: CHARLESTON

IN THE MATTER OF: ALICE SHAW-BAKER

2008 GC 10-088
FILED 10/10/08

IN THE PROBATE COURT

VISITOR'S REPORT

CASE NUMBER: 2008-GC-10-088

The undersigned court-appointed visitor in this guardianship proceeding submits the following report concerning the investigation which I conducted pursuant to Section 62-5-303 of the South Carolina Probate Code. In my visit to the place where the allegedly incapacitated person resides, I observed the following.

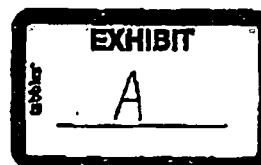
REPORT ON THE INCAPACITATED PERSON

1. Date and place of interview: October 8, 2008
[REDACTED] 29407
2. Oriented as to the time and place? ☒ YES ☐ NO
3. Physical Appearance: Ms. Shaw-Baker presented well. She was well-groomed and properly dressed.
4. Who are his/her closest family members? Ms. Shaw-Baker has family in Long Beach, CA
5. Does he/she have a doctor? ☐ NO ☒ YES If yes, please list the doctor's name, address, and phone number.
Dr. McGuire, Jr., M.D. 615 Wesley Dr., Ste 300 Charleston, S.C. 29407 (843) 268-4400
6. Does he/she have an attorney? ☐ NO ☒ YES If yes, please list the attorney's name, address, and phone number.
John Hughes Cooper, Esquire
PO Box 395
Sullivan's Island, SC 29482
Cain Denny, Esquire
PO Box 1205
Charleston, SC 29402
7. Does he/she think he/she needs help caring for himself/herself? ☒ NO ☐ YES If yes, in what areas?
Ms. Shaw-Baker is enjoying the company that she gets from having helpers with her. She does not believe she requires assistance.
8. Would he/she like help in caring for himself/herself? ☒ YES ☐ NO
8. Does he/she know the proposed Guardian? ☒ YES ☐ NO
10. How does he/she feel about having that person appointed as his/her guardian?

Ms. Shaw-Baker is well aware of the fact that she has co-Guardians. She is opposed to the Court's insistence that she is in need of such protection. Ms. Shaw-Baker does not want Ms. Orenstein to continue in her duties. She sees Ms. Orenstein as "cold." Ms. Shaw-Baker is related by blood to her other co-Guardian, Ms. Lisa Fisher of California. Although, Ms. Shaw-Baker does not feel the need for the protection of a Guardian, she is comforted by knowing Lisa can and will assist her when it is necessary.

11. Does he/she feel any of the guardian powers or duties should be limited or restricted in any way? If so, how?

FORM 631PC (1/85)
62-6-302, 62-6-303, 62-6-305, 62-6-414



Page 1 of 4

Ms. Shaw-Baker feels she should have the final decision with regard to her own care and person. She has stated that she likes having the assistants with her. She stated that she feels she is likely to continue to seek assistance and she will make these decisions with the counsel of her great-niece, Lisa Fisher. Ms. Shaw-Baker would request that no Guardian be appointed for her at this time.

12. How does he/she feel about the proposed guardianship?

Ms. Shaw-Baker would request that no Guardian be appointed for her at this time.

13. How does he/she feel about the proposed scope and duration of the proposed guardianship?

Ms. Shaw-Baker would request that no Guardian be appointed for her at this time.

REPORT ON THE PROPOSED GUARDIAN

1. Has an adult protective service case or family management case ever been opened on this person? ☒ NO ☐ YES
If yes, please explain.

If yes, does the DSS record reveal anything you believe the court should know? ☒ NO ☐ YES If yes, please explain.

2. Does your investigation of the proposed guardian reveal anything that you believe the court should know? ☒ NO ☐ YES If yes, please explain.

3. Does your investigation reveal any other person who should be considered to be appointed the guardian in this matter? ☒ NO ☐ YES If yes, please explain, including name, address, telephone, age, and relationship to allegedly incapacitated person.

REPORT ON CONDITION OF PRESENT PLACE OF RESIDENCE

1. Date and time visited: October 8, 2008
1:30 hrs (3:30 pm)
2. Address (include street, city, county, state, zip): [REDACTED] Charleston, Charleston County,
SC 29407
3. Type of abode: single story ranch house
4. Condition:
- a. exterior clean, no repairs needed
 - b. interior: clean, no repairs needed. 1 bedroom is filled with boxes, however, there is new carpet and the walls and ceilings have been freshly painted.
 - c. utilities working: yes
 - d. cleanliness: above average
 - e. fire hazards: none noted

f. other (explain):

Ms. Shaw Baker's house has been cleaned up and made habitable as the result of a Charleston County Probate Court Order. Ms. Shaw Baker has had around the clock care since then and she has had help with cooking and cleaning.

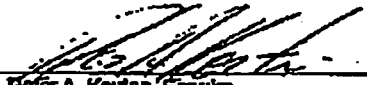
CONCLUSIONS AND ADDITIONAL COMMENTS:

Prior to your visit, did you know the person who is alleged to be incapacitated? ☒ NO ☐ YES If yes, please explain.

Prior to your visit, did you know the person who is seeking appointment? ☒ NO ☐ YES If yes, please explain.

Prior to your visit, did you or do you now have a personal interest in these proceedings? ☒ NO ☐ YES If yes, please explain.

Executed this 6th day of October, 2008.

Signature: 
Name: Peter A. Kouten, Esquire
Address: 7013 Dorchester Rd, Ste E, Box 6
N Charleston, SC 29418
Telephone (O): 843-787-5284
(H): 843-670-3919

Re: Matter of Alice Shaw-Baker
Case No.: 2008-GC-10-088
Post-Hearing Court Ordered Visits

November 7, 2008

Ms. Shaw-Baker was at the rear patio with the caregiver. She was not overjoyed to see me and was of the mind that the subsequent visits were not necessary. Although agitated, she was cordial and alert. The appointment for a full neuropsychological evaluation by Randolph Waid, Ph.D. per Court's order has been set. It is in two weeks (November 20) in Mt. Pleasant. Ms. Shaw-Baker smokes outside on the patio or in the kitchen.

November 14, 2008

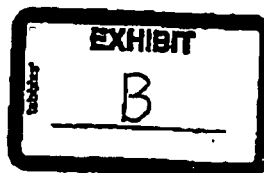
Alice was happier and in better spirits. The house is clean and the heater is operational. It is colder. She is awaiting her doctor's appointment next week. She has a hair appointment this afternoon. She is smoking outside in better weather but on cold days she smokes in the kitchen. She remains in the tiled areas of the house when smoking. The caregivers state she is sleeping well and eating properly. Lisa Fisher calls regularly and sent the caregivers each a gift (peanut brittle and box candy)

November 21, 2008

Alice had her doctor's visit yesterday. She was sleeping. She spent most of yesterday taking a battery of tests. The caregiver stated that she got home yesterday and slept from 10:30 pm to 6:00 am. It was tiring. She has been in good spirits. The POD (mobile storage unit) was re-delivered to the house so Alice could get her winter clothes. She is considering purchasing a shed for her things so that the POD can be emptied. The Guardian is awaiting doctor's results.

December 1, 2008

Alice had just woken from a nap. She has retrieved more stuffed animals from the POD. They are cleaning an area in a rear shed to accommodate the things in the POD. It is a process. The house is well-kept and uncluttered. Alice continues to smoke outside or in the kitchen per Court-Order. I spoke with Lisa Fisher regarding the doctor's report and he has not completed the final draft. She will forward the test result to the Court when they are complete. Ms. Fisher further stated that Alice will also be seeing a physician regarding her medical conditions.



STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	COMMITMENT DIVISION
COUNTY OF CHARLESTON	)	CASE NO: 2008-GC-10-088
ELISABETH SPENCER,	)	
	)	
Petitioner,	)	MONTHLY VISITOR'S REPORT
	)	BY COURT-APPOINTED
VS.	)	GUARDIAN AD LITEM FOR
	)	ALICE SHAW-BAKER
ALICE SHAW-BAKER, an alleged	)	(NOVEMBER 1 THROUGH DECEMBER 1, 2008)
Incapacitated person, and	)	
LISA FISHER, her next of kin,	)	
	)	
Respondents.	)	

This Court, with the Honorable Judge Tamara C. Curry presiding on October 29, 2008, heard arguments regarding the Appointment of a Guardian and Conservator for Ms. Alice Shaw-Baker. Pursuant to the Guardian and Conservator Appointment Orders for Ms. Shaw-Baker, Respondent, Lisa Fisher, has assumed the duties as permanent Guardian and Conservator for Ms. Shaw-Baker.

The Court further ordered that "until receipt of the neuropsychological and medical reports, the Guardian ad Litem Peter A. Kouten shall visit Alice Shaw-Baker on a weekly basis and shall submit to this Court a brief written report on the condition of Alice Shaw-Baker on a monthly basis."

The Guardian ad litem Peter A. Kouten submits the monthly report for the time period November 1 through December 1, 2008 as Exhibit A to this report, now incorporated by reference.

Peter A. Kouten, Esquire
7013 Dorchester Road, Suite E, Box 5
North Charleston, SC 29418
Tel: (843) 767-5284
Fax: (843) 767-5286
Cell: (843) 670-3919
pkouten@gmail.com

This first day of on December, 2008.
Charleston, South Carolina

THE KOUTEN LAW FIRM, LLC

7013 DORCHESTER ROAD, SUITE E
NORTH CHARLESTON, SOUTH CAROLINA 29418

TEL: (843) 767-5284

FAX: (843) 767-5286

December 3, 2008

Lisa Fisher, Esquire

PO Box 91112

Long Beach, CA 90809-1112

Re: Matter of Alice Shaw- Baker

Case No.: 2008-GC-10-088

DATE	DESCRIPTION	HOURS	AMOUNT
11/7/08	Court Ordered weekly visit per Judge Curry NOTE: all visit summaries are attached and incorporated by reference	1.7	\$255.00
11/14/08	Weekly Visit	.6	90.00
11/21/08	Weekly Visit	1.2	180.00
12/1/08	Weekly Visit	.4	60.00
SUBTOTAL FOR SERVICES THROUGH Dec 3, 2008			\$585.00
SUBTOTAL FOR SERVICES THROUGH Nov 3, 2008 (prior invoice)			3915.84
TOTAL DUE			<u>\$4500.84</u>



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

ELISABETH SPENCER,

Petitioner,

vs.

ALICE SHAW-BAKER, an alleged
Incapacitated person, and
LISA FISHER, her next of kin,

Respondents.

IN THE PROBATE COURT
COMMITMENT DIVISION
CASE NO: 2008-GC-10-088

**ORDER
GRANTING FEES TO
APPOINTED ATTORNEY AND
GUARDIAN AD LITEM**

08 OCT 12 PM 4:59

Hearing Date:

Judge:

Petitioner:

Attorney for Petitioner:

Alleged Incapacitated Person:

Guardian ad Litem:

Other Respondents:

Attorneys for Lisa Fisher:

Temporary Co-Guardian:

Temporary Conservator:

October 29, 2008

Hon. Tamara Curry

Elisabeth Spencer

C. Mac Glass, Jr.

Alice Shaw-Baker

Peter A. Kouten, Esq.

Lisa Fisher

John Hagler Cooper, Esq.

Cole Denny, Esq.

John Townsend Cooper, Esq.

Lisa Fisher and Jane Orantzin

Family Services, Inc.

ACC
192
11/11/08

This matter came before this Court for a hearing on appointment of Guardian and Conservator. On July 31, 2008, Elisabeth Spencer filed Petitions for a Finding of Incapacity and for Appointment of Guardian and Conservator. The Court appointed Attorney Peter A. Kouten to represent the interests of Ms. Alice Shaw-Baker in this matter. Based on the Court's request resulting from the hearing on October 29, 2008, Peter A. Kouten, Esquire has submitted for the Court's review and approval his bill for services as Ms. Shaw-Baker's attorney and Guardian ad Litem incurred from October 6, 2008 through November 3, 2008.

FINDINGS OF FACT

After reviewing the Guardian ad Litem's itemized bill, I find that the professional fees requested by the GAL, Peter A. Kouten, Esquire, for the services rendered to Ms. Shaw-Baker and

APPROVED:
JULIE BLANKENHORN, CLU
JULIE BLANKENHORN, CLU
JULIE BLANKENHORN, CLU
CHARLESTON, S.C. 29403



for disbursements during the above referenced dates in the amount of \$3915.84 (THREE THOUSAND NINE HUNDRED AND FIFTEEN DOLLARS AND EIGHTY FOUR CENTS) are appropriate, fair and reasonable. Mr. Kouten is a member in good standing of the South Carolina and Charleston County Bar Associations who regularly appears before this Court. I find that the GAL's hourly rate of \$150.00 in this matter is fair and reasonable in light of his experience and training, and is within the prevailing rates of attorneys and GAL's of similar experience and training. I find that his services have been of benefit to Ms. Shaw-Baker and the other parties in this matter.

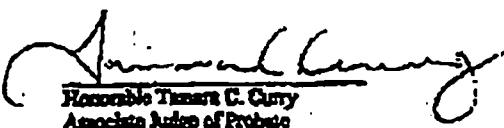
Based on the above, it is therefore

2/12/08
ORDERED, ADJUDGED AND DECREED that the Conservators for Ms. Hopkins pay to the court appointed attorney and Guardian *ad Hoc* professional fees in the amount of \$3915.84 (THREE THOUSAND NINE HUNDRED AND FIFTEEN DOLLARS AND EIGHTY FOUR CENTS) for his services rendered and disbursements to Ms. Shaw-Baker during the above referenced dates; and it is further,

ORDERED, ADJUDGED AND DECREED that Attorney Kouten submit future periodic bills for his continued services as attorney and Guardian *ad Hoc* for Ms. Alice Shaw-Baker, including visits and reports to the Court, until such time as this Court deems that his services are no longer necessary in reference to the case at bar.

IT IS SO ORDERED.

in
This 12th day of November, 2008
Charleston, South Carolina


Honorable Tamara C. Curry
Associate Judge of Probate
County of Charleston

Print

Page 1 of 1

Subject: Alice Shaw-Baker report
From: Peter Kouten (pkouten@gmail.com)
To: shiplaw@hcooper.com; lfisher8738@yahoo.com
Date: Tuesday, December 23, 2008 8:51 AM

Dear John and Lisa:

Please find attached report that was forwarded to the court last month. I will continue to forward you these monthly until I am relieved. Note that Family Services did pay the initial invoice so the amount due is for November visits only. I will be sending a December visitor's report next week so if you want to wait for then to send payment, that is fine. I saw Alice yesterday and she was agitated. Money issues. See wanted me to come back today to see what was left in the POD. I hope to make sure it is empty today. Call me with any questions or comments and have a Merry Christmas.

Peter A. Kouten

Kouten Law Firm, LLC

7013 Dorchester Road, Suite E

North Charleston, SC 29418

office: 843-767-5284

cell: 843-670-3919

fax: 843-767-5286

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7/30/2012

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Page 1 of 2

Subject: Family Services
From: Peter Kouten (pkouten@gmail.com)
To: lfisher6738@yahoo.com
Date: Thursday, December 18, 2008 @14 AM

Lisa:

I hope all is well for you. I understand from Alice that you are in a large trial.

I have your letter dated December 7. I wanted to relay to you that I have received a check from Family Services for my initial invoice so that the balance due is the \$585.00 from the second invoice. I did send the second invoice to them and they told me the accounts had been transferred. It must be that the documents are on the way.

I have been checking on Alice and she has been in good spirits. I will continue to visit until the court relieves me. Please call me if you need me to do anything for Alice. I have yet to see any report from doctors. I will keep you posted.

Thanks, Peter

Peter A. Kouten

Kouten Law Firm, LLC

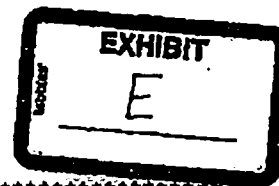
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North Charleston, SC 29418

office: 843-767-5284

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Subject: RE: Dr Waid's report
From: Peter Kouten (pkouten@gmail.com)
To: lfisher6736@yahoo.com
Cc: shiplaw@hcooper.com
Date: Friday, January 18, 2009 1:57 PM

Thanks Lisa. I was responding to what the order actually said as I had to re-read it after the Jane incident. Be assured that I will help check on Alice as long as you like. Peter

Peter A. Kouten

Kouten Law Firm, LLC

7013 Dorchester Road, Suite E

North Charleston, SC 29418

office: 843-767-5284

cell: 843-670-3919

fax: 843-767-5286

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From: lisa fisher [mailto:lfisher6736@yahoo.com]



<http://us.mg5.mail.yahoo.com/neo/launch?.rand=45mpaf7vleslt>

7/30/2012

Print

Page 2 of 3

Sent: Wednesday, January 14, 2009 4:30 PM
To: pkouten@gmail.com
Cc: john hughes cooper
Subject: Re: Dr Waid's report

Dear Mr. Kouten,

I received and reviewed your letter. Alice has two doctor's appointments on January 26, 2009. I will be traveling to Charleston to help with these appointments.

I will bring to the doctor's attention the report from Dr. Waid, and will attempt to see the appropriateness of an MRI.

I don't recall asking when you would be relieved. I always thought it would be when the status conference was heard. I certainly hope that I did not make it sound like you were not appreciated and my desire was to get you off the case, because I certainly do appreciate all of your work and assistance to my aunt. Further, I am glad that Alice has a trusted person who can visit with her occasionally. I want her to have a full and active life. So Thank you for all of your help.

Sincerely,

Lisa Fisher
(562) 965-3267

— On Wed, 1/14/09, Peter Kouten <pkouten@gmail.com> wrote:

From: Peter Kouten <pkouten@gmail.com>
Subject: Re: Dr Waid's report
To: lfisher6736@yahoo.com, "John hughes cooper" <shiplaw@jhc.cooper.com>
Date: Wednesday, January 14, 2009, 11:35 AM

Lisa and John:

Please find attached visitor's letter to the Court concerning Dr Waid's evaluation. It seems that the next step in satisfying the Court Order is to receive and forward the "medical evaluation by a medical doctor." Further, Dr. Waid sought an evaluation from a "Geriatric Psychologist." This appointment should be set and final evaluation and report should be forwarded to the Court. When these items are complete, it appears that the Court would like to set a status conference to determine the procedure to back off of 24 hour care if warranted.

To answer Lisa's question, it appears that I will continue in my visits until relieved by the Court. That will probably happen during the status conference. If we know a rough timeframe for receipt of reports, I'm sure the status conference date can be set if it is your intention to back off 24 hr care.

Sincerely,

Peter A. Kouten
Kouten Law Firm, LLC
7013 Dorchester Road, Suite E
North Charleston, SC 29418
office: 843-767-5284
cell: 843-670-3919

fax: 843-767-5286

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Subject: RE: Alice

From: Peter Kouten (pkouten@gmail.com)

To: ifisher6736@yahoo.com

Cc: shiplaw@hcooper.com

Date: Friday, January 2, 2009 5:52 AM

Thanks Lisa. I have been tracking Jane's phone number this am. I spoke with the court on Wednesday and they suggested mailing her a confirmation of our discussion after we speak. I will make sure she knows:

1. she is no longer appointed in any capacity as it applies to Alice.
2. any contact re: Alice should come through me or John or Lisa

I will discuss these issues with her and follow up with the letter. She must have sent the email because she knows I went to the court. It's good to know that she has the email addresses showing that she could have emailed you in the first instance and not barged into the house. Alice had also mentioned that she had not spoken to Doris since she called the Charleston Police but lately she had been "running into her." I guess this is during her walks. She found it curious and believed it was a fact finding encounter.

Peter A. Kouten

Kouten Law Firm, LLC

7013 Dorchester Road, Suite E

North Charleston, SC 29418

office: 843-767-5284

cell: 843-670-3919

fax: 843-767-5286



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From: Lisa Fisher [mailto:lfisher6736@yahoo.com]
Sent: Friday, January 02, 2009 7:37 AM
To: pkouten@gmail.com
Cc: John Hughes Cooper
Subject: Fw: Alice

Dear Mr. Kouten,

I received this email from Orenstein. I was with Alice all day on New Years. She denies calling Thees. I am concerned about Orenstein's involvement--Thees was their witness, it would seem that she would know. You know more about the procedural issues in the department than I, so I thought I should tell you. I was surprised that I didn't get copies of the inventory, accounting, billings of the other side, etc. I have spoken to Mr. Cooper about getting the documents, and am diligently working on marshalling the assets.

I am taking Alice to a new doctor today. I will let you know how it goes.

Also, I got Alice an air sanitizer for her house to get rid of the smoke. It will arrive in about a week.

Thank you for all of your help.

Lisa Fisher

-- On Thu, 1/1/09, guardianjane@bellsouth.net <guardianjane@bellsouth.net> wrote:

<http://us.mg5.mail.yahoo.com/neo/launch?.rand=45mpaf7vltst>

7/30/2012

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Page 3 of 3

From: guardianjane@bellsouth.net <guardianjane@bellsouth.net>
Subject: Alice
To: "shiplaw" <shiplaw@jhcooper.com>, "lfisher6736" <lfisher6736@yahoo.com>
Date: Thursday, January 1, 2009, 7:20 AM

I had a call this morning from Doris Thees, Alice's neighbor, who did not know that I am no longer involved with Alice. She was calling to tell me that Alice called her at 6am today, and she'd appreciate it if someone could put a stop to such calls.

I just think you should know.

HAPPY NEW YEAR!

Jane Orenstein

THE KOUTEN LAW FIRM, LLC

7013 DORCHESTER ROAD, SUITE E
NORTH CHARLESTON, SOUTH CAROLINA 29418
TEL: (843) 767-5284
FAX: (843) 767-5286

January 5, 2009

VIA EMAIL (guardianjane@bellsouth.net)

Ms. Jane Ornstein
128 Wainwright Manor
Summerville, SC 29485

Re: Matter of Alice Shaw-Baker
2008-GC-10-0

Dear Ms. Ornstein:

Please accept this letter as a follow-up to our recent conversation regarding Ms. Alice Shaw-Baker. We spoke on January 2 after I had received information from Alice's caregiver that you had presented yourself at Ms. Shaw-Baker's house. There were conflicting facts regarding your visit and the circumstances surrounding the visit. The important outcome is that you are noticed that I am continuing in my duties as Court-Appointed Visitor. Please contact me first with any matters pertaining to Ms. Shaw-Baker.

My cell phone number is 843-670-3919.

Sincerely,

Peter A. Kouten

cc: Lisa Fisher, Esq. **VIA EMAIL**
John Townsend Cooper, Esq. **VIA EMAIL**
Mac Gibson, Esq. **VIA EMAIL**



Print

Page 1 of 2

Subject: Fee statement

Q From: Peter Kouten (pkouten@gmail.com)
To: lfisher8738@yahoo.com;
Cc: shiplaw@cooper.com;
Date: Saturday, January 10, 2009 6:22 AM

Ms. Fisher:

First, I want to thank you for the boy's gift certificates. They were appreciative. I am forwarding the Order for fees signed by Judge Curry. I wanted to fax the signed Order but I did not see a fax number on your letterhead. I will follow this email with a hardcopy of the signed Order.

As always, please contact me if you have any questions or need any assistance.

Peter A. Kouten

Kouten Law Firm, LLC

7013 Dorchester Road, Suite E

North Charleston, SC 29418

office: 843-767-5284

cell: 843-670-3919

fax: 843-767-5286



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7/30/2012

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Re: Matter of Alice Shaw-Baker
Case No.: 2008-GC-10-088
Post-Hearing Court Ordered Visits

December 12, 2008

Alice is well. She continues to smoke but restricts her smoking to the kitchen area and outside. She leaves that house for food shopping/cigarettes with the caregivers. Usually 5x a week. The POD in the driveway is near empty and it should be returned to the source by the end of the month. The items are being sorted and stored in the rear sheds of closets, etc. Alice has her hair appointment at the house and the hairdresser seems to have become part of the team. She sits with Alice several hours a week. I have received information from Ed Jellison at Family Services, Inc. that Lisa Fisher has been given charge of Alice's finances. There has been no update on the delivery of the pending doctor's reports.

December 22, 2008

Alice had a list of concerns today. She was not in good spirits. She recognizes that she is not in control of her money and she explained that she needs money for food- it is her medicine. Alice treats her diabetes through diet. She stated that Attorney Cooper was to stop by with money but that he had yet to arrive. I later confirmed that Mr. Cooper did bring Alice \$200. The funds are in transition as Lisa Fisher met with Ed Jellison and received Alice's assets last week. Alice seems more and more depressed. Lisa also took Alice to the doctor for further examinations. Reports on those exams and the prior exam are pending. Alice has boxes in the POD but it is almost empty. I am returning to visit Alice tomorrow, at her request, to see if the POD can be returned by the end of the month.

December 23, 2008

Alice was in better spirits today. The POD is being emptied and Alice is storing many items in the rear sheds. It seems that Alice spends a good part of her day on the sofa watching TV. It would seem that she should be getting out more and being exposed to some activity. I expressed this to Attorney Cooper and he will discuss these issues with Lisa Fisher. I asked Alice what she wanted for Christmas and she said cigarettes. She has continued to smoke in the non carpeted areas of the house. She often forgets she is smoking and pulls another cigarette from the pack while holding a lit cigarette. Barbara Anne, her hair dresser has been staying with Alice some, but I am not sure Alice remembers who she is.

December 24, 2008

Short visit to see Alice and empty POD. Final boxes moved to the shed.

December 29, 2008

Call from Lisa Fisher re: a visit to Alice from Jane Ornstein. Alice was upset by the casual visit and the caregiver was cordial and really didn't know how to react. She should not be visiting as it upsets Alice and she has been removed as temporary guardian. I will seek guidance from the court in this matter.

Visited Alice and talked about Ms. Ornstein. Alice stated that Ms. Ornstein was not there to bring her a gift as she claimed. Alice is doing well and wants to get out of the house more often. Lisa is visiting for New Year's and will take Alice on doctor appointments while she is here.



THE KOUTEN LAW FIRM, LLC

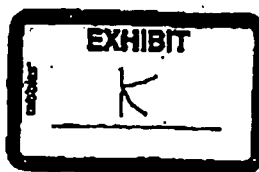
7013 DORCHESTER ROAD, SUITE E
NORTH CHARLESTON, SOUTH CAROLINA 29418
TEL: (843) 767-5284
FAX: (843) 767-5286

January 5, 2009

Lisa Fisher, Esquire
PO Box 91112
Long Beach, CA 90809-1112

Re: Matter of Alice Shaw- Baker
Case No.: 2008-GC-10-088

DATE	DESCRIPTION	HOURS	AMOUNT
12/12/08	Court Ordered weekly visit per Judge Curry NOTE: all visit summaries are attached and Incorporated by reference	1.1	165.00
12/22/08	weekly visit Ms. Baker	1.4	210.00
12/23/08	weekly visit Ms. Baker	.7	105.00
12/24/08	visit w/ Alice to empty POD	.3	45.00
12/29/08	TC Lisa Fisher re: visit from Jane Ornstén to Alice Discuss options and solutions for Alice getting Out of house, doctor's reports, notice to Ct re: Jane Visit w/ Alice re: Jane's visit and Lisa coming	.4 .7	60.00 105.00
SUBTOTAL FOR DECEMBER SERVICES			\$690.00
SUBTOTAL FOR NOVEMBER INVOICE THROUGH Dec 3, 2008			\$585.00
TOTAL DUE			<u>\$1275.00</u>



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT
COMMITMENT DIVISION
CASE NO: 2008-GC-10-088

ELISABETH SPENCER,)
Petitioner,)
vs.)
ALICE SHAW-BAKER, an alleged)
Incapacitated person, and)
LISA FISHER, her next of kin,)
Respondents.)

ORDER GRANTING FEES
BY COURT-APPOINTED
GUARDIAN AD LITEM FOR
ALICE SHAW-BAKER
(DECEMBER 12 - DECEMBER 29, 2008)

This Court, with the Honorable Judge Tamara C. Curry presiding on October 29, 2008, heard arguments regarding the Appointment of a Guardian and Conservator for Ms. Alice Shaw-Baker. Pursuant to the Guardian and Conservator Appointment Orders for Ms. Shaw-Baker, Respondent, Lisa Fisher, has assumed the duties as permanent Guardian and Conservator for Ms. Shaw-Baker.

The Court further ordered that "until receipt of the neuropsychological and medical reports, the Guardian ad Litem Peter A. Kouten shall visit Alice Shaw-Baker on a weekly basis and shall submit to this Court a brief written report on the condition of Alice Shaw-Baker on a monthly basis."

The Guardian ad Litem Peter A. Kouten submits the monthly report for the time period December 1 through December 31, 2008 as Exhibit A to this report, now incorporated by reference. The Court further Ordered that the GAL submit monthly fee requests to the Court for approval.

FINDINGS OF FACT

After reviewing the Guardian *ad litem*'s itemized bill, I find that the professional fees requested by the GAL, Peter A. Kouten, Esquire, for the services rendered to Ms. Shaw-Baker and for disbursements during the above referenced dates in the amount of



Six Hundred and Ninety dollars and 00/100 (\$690.00) are appropriate, fair and reasonable. Mr. Kouten is a member in good standing of the South Carolina and Charleston County Bar Associations who regularly appears before this Court. I find that the GAL's hourly rate of \$150.00 in this matter is fair and reasonable in light of his experience and training, and is within the prevailing rates of attorneys and GAL's of similar experience and training. I find that his services have been of benefit to Ms. Shaw-Baker and the other parties in this matter.

Based on the above, it is therefore

ORDERED, ADJUDGED AND DECREED that the Conservator pays to the court appointed attorney and Guardian *ad litem* professional fees in the amount of Six Hundred and Ninety dollars and 00/100 (\$690.00) for his services rendered and disbursements during the above referenced dates; and it is further,

ORDERED, ADJUDGED AND DECREED that Attorney Kouten submit future periodic bills for his continued services as attorney and Guardian *ad litem* for Ms. Alice Shaw-Baker, including visits and reports to the Court, until such time as this Court deems that his services are no longer necessary in reference to the case at bar.

IT IS SO ORDERED.

Honorable Tamara C. Curry
Associate Judge of Probate
County of Charleston

This ___ day of January, 2009
Charleston, South Carolina

Print

Page 1 of 2

Subject: Re: Dr Waid's report

From: Peter Kouten (pkouten@gmail.com)

To: lfisher6738@yahoo.com; shiplaw@cooper.com

Date: Wednesday, January 14, 2009 11:35 AM

Lisa and John:

Please find attached visitor's letter to the Court concerning Dr Waid's evaluation. It seems that the next step in satisfying the Court Order is to receive and forward the "medical evaluation by a medical doctor." Further, Dr. Waid sought an evaluation from a "Genetic Psychologist." This appointment should be set and final evaluation and report should be forwarded to the Court. When these items are complete, it appears that the Court would like to set a status conference to determine the procedure to back off of 24 hour care if warranted.

To answer Lisa's question, it appears that I will continue in my visits until relieved by the Court. That will probably happen during the status conference. If we know a rough timeframe for receipt of reports, I'm sure the status conference date can be set if it is your intention to back off 24 hr care.

Sincerely,

Peter A. Kouten

Kouten Law Firm, LLC

7013 Dorchester Road, Suite E

North Charleston, SC 29418

office: 843-767-5284

cell: 843-670-3919

fax: 843-767-5286



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<http://us.mg5.mail.yahoo.com/neo/launch?.rand=45inpaf7vleslt>

7/30/2012

Print

Page 2 of 2

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THE KOUTEN LAW FIRM, LLC

7013 DORCHESTER ROAD, SUITE E
NORTH CHARLESTON, SOUTH CAROLINA 29418
TEL: (843) 767-5284
FAX: (843) 767-5286

January 14, 2009

Elizabeth Sykes
Charleston County Probate Court
100 Broad Street, Ste 469
Charleston, SC 29401

Re: Matter of Alice Shaw-Baker
Case No.: 2008-GC-10-088

Dear Ms. Sykes:

As a condition of the Court's Guardianship and Conservatorship Appointment Order for Ms. Alice Shaw-Baker dated 11/19/08, I was to "visit Alice Shaw-Baker on a weekly basis" until receipt of reports from neuropsychological and medical evaluations. The neuropsychological evaluation was purposed by Dr. Waid per Court Order.

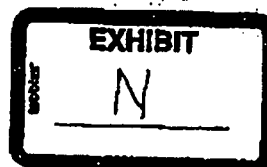
The Order sought to clarify whether Ms. Shaw-Baker:

1. has dementia and, if so, can it be addressed with medication;
2. could competently and safely drive an auto;
3. requires 24 hour care and, if not, a recommendation of appropriate care levels and a proper procedure to determine the same.

It is Dr. Waid's medical opinion that Alice has "definitive neurocognitive impairment" which gives rise to "a dementia." Dr. Waid is unsure whether the difficulty is associated with her diet/ diabetes. He does recommend she be assessed by a geriatric psychiatrist to determine if she can profit from diabetes medications. He also suggests an MRI to help determine the "causal factors of her neurocognitive decline."

Dr. Waid does not believe Alice should drive in her current state, however, her condition may improve from the above course of action.

Dr. Waid is of the belief that Alice can have less than 24 hour supervision and suggests a minimum of 12 hours daily between the hours of 8 am and 8 pm to include the preparation of all her meals. Dr. Waid suggests continued monitoring may alter Alice's need for care. She may need less if she responds to diabetes medications if they are necessary based on the evaluation.



Additionally, Dr. Waid suggests Alice maintain primary care on a regular basis concerning her diabetes, hypertension, cholesterol, and other medical conditions.

If you have any questions, please contact my office.

Sincerely,

Peter A. Kouten
Kouten Law Firm, LLC

cc: Lisa Fisher
John Hughes Cooper

STATE OF SOUTH CAROLINA

COUNTY OF: CHARLESTON

IN THE MATTER OF: ALICE SHAW-BAKER

IN THE PROBATE COURT

CASE NUMBER: 2009-ES-10-318
09 MAR 10 AM 9:30

APPLICATION FOR

INFORMAL

☒ PROBATE OF WILL
☒ APPOINTMENT

(check any that apply)

PETITION FOR

FORMAL

☐ TESTACY
☒ APPOINTMENT

Applicant/Petitioner: Beadie Wyndham Huckabee

Address:

Telephone:

cell 709-6860

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. Give your relationship to the decedent, if any, and your interest in this proceeding.

Nominated Personal Representative for Decedent's Will

2. Decedent Information

Name: Alice Shaw-Baker

Social Security Number: [REDACTED]

Date of Birth: [REDACTED] 1929

Date of Death: [REDACTED] 2009

Age at date of death: 79

Domicile at date of death: CHARLESTON

SC
(state)

3. Venue for this proceeding is proper in this county because:

- ☒ Decedent was domiciled in this county at date of death.
☐ Decedent was not domiciled in South Carolina, but property of Decedent was located in this county at date of death.
☐ Decedent has a right to take legal action in this county because:

- 4.a. Names and addresses of devisees in the will including dates of birth of minors. If there are no minors, so state.

Name	Date of Birth	Address	Relationship to Decedent
Beadie Huckabee	not a minor	20044 Dupont Street, PO 20442	friend
Sandra Byrd	not a minor	Goose Creek, SC	friend
Kay Passafiume	not a minor	Charleston, SC	friend

(use additional sheet if necessary)

EXHIBIT

0

FORM 600 (7/2004)
62-3-201, 62-3-300, 62-3-401, 62-3-402, 62-3-403
62-3-414, 62-3-407, 62-3-704, 44-23-1060, 44-23-1120

Page 1 of 6

- 4.b. Names and addresses of intestate heirs who are not devisees, including dates of birth of minors. If there are no minors, so state. (Intestate heirs are the persons who would inherit if the decedent left no will.

Name	Date of Birth	Address	Relationship to Decedent
Betty Fisher	not a minor	PO Box 91112, Long Beach, CA 90809	niece
Lisa Fisher	not a minor	PO Box 91112, Long Beach, CA 90809	grand niece

(Use additional sheet if necessary)

5. Did decedent have any change of marital status or the birth or adoption of any children after execution of this will, if one exists, or has any child of the decedent been born since his death, or is any birth of a child of the decedent anticipated? (This includes legitimate children.)
- ☒ NO ☐ YES If yes, please explain, on page 3.
6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental Health facility during his/her lifetime?
- ☒ NO ☐ YES If yes, please explain, on page 3.
7. Has a guardian or conservator ever been appointed for this person?
- ☐ NO ☒ YES If yes, please explain on page 3.
8. Has a personal representative of the decedent been appointed prior to this date by a Court in this state or elsewhere?
- ☐ NO ☒ YES If yes, please state details, including name and address of such Personal Representative on page 3.
9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?
- ☒ NO ☐ YES If yes, please state details, including names and addresses of such Personal Representative, on page 3.
10. Have more than ten years passed since the decedent's death?
- ☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.
11. The decedent died with a personal estate of about the value of \$100 and real estate of about the value of \$100. (A full inventory and appraisal, Form 6350PG, must be filed within 60 days.) If decedent was non-resident, please attach South Carolina Commission form ET 101.
12. After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?
- ☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section 11.

II. IF A WILL EXISTS, PLEASE, COMPLETE THIS SECTION.

1. Regarding the decedent's will:

- ☒ The original is attached
☐ The original is in the Court's possession
☐ An authenticated copy of a will probated in another jurisdiction is attached
☐ An authenticated copy of a will not probated in another jurisdiction is attached
☐ The will is lost, destroyed, or otherwise unavailable, however, a description of its contents is attached

2. Do you believe, to the best of your knowledge, the will described above was validly executed?

- ☒ YES ☐ NO If no, please explain on page 3.

3. The date of execution of the will was: May 21, 2001

codicil(s): _____

4. Are you aware of any instrument or document amending or revoking the will?

- ☒ NO ☐ YES If yes, please explain on page 3.

5. Have you exercised reasonable diligence to determine there is no instrument or document revoking the will?

- ☒ YES ☐ NO If no, please explain on page 3.

6. Do you believe the will defined in "1" above is the decedent's last will?

- ☒ YES ☐ NO If no, please explain on page 3.

COMPLETE EXPLANATION (S) FOR QUESTIONS IN SECTIONS I and II HERE.
(If more space is required, use additional sheet.)

Section I, Part 7- Lisa Fisher was appointed guardian and conservator for Mr. Shaw-Baker by Order of CC Probate Court on November 1, 2001.
Section I, Part - This court has appointed Lisa Fisher based on her presentation of an alleged Last Will and Testament presents is dated _____

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING.

1. The name(s) and address(es) of the proposed Personal Representative(s) below:

Bessie Wyndham Hucklebee

2. Priority for this appointment is:

- ☒ named as Primary Personal Representative in will or nominee of Primary Personal Representative
☐ named as Alternate Personal Representative in will or nominee of Alternate Personal Representative
☐ named as nominee of Primary and/or Alternate Personal Representative
☐ other devise of decedent, or nominee (describe): _____ or nominee of said devise
☐ surviving spouse of decedent, or nominee of said spouse
☐ other heir of decedent (describe): _____
☐ creditor (Forty-five days after death must have passed), or nominee of creditor
☐ other (describe): _____
☐ nominee of any of the above

3. List below the names of any other persons, if any, having a prior or equal right of appointment (use priority above).

none

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief, and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 2nd day of April, 2004

Signature: Bessie Hucklebee
Name: Bessie Hucklebee
Address: 1000 1st Street, Charleston, SC

Notary Public for South Carolina
My Commission Expires: 11/15/2011

Email: _____
Telephone (O): _____
(H): _____

ORDER OF INFORMAL PROBATE

It is HEREBY ORDERED that the above application for probate of a will be ☒ GRANTED ☐ DENIED Informally this 11th day of April, 2004

Samuel L. Cherry
Probate Court Judge

ORDER FOR HEARING ON FORMAL PETITION

IT IS HEREBY ORDERED that a hearing on this matter be set for:

DATE _____

TIME _____

PLACE _____

Pursuant to Section 82-1-401, the petitioner is ordered to give notice of this hearing to all interested persons at least twenty (20) days prior to the hearing.

Executed this _____ day of _____, 20____

Probate Court Judge

ORDER OF FORMAL TESTACY

On hearing of the above petition, this Court finds that the person is deceased, venue is proper, and the proceeding was commenced within appropriate time limits.

The Court further finds that

☐ the decedent died intestate. The heirs are:

☐ the decedent died testate. IT IS HEREBY ORDERED that the Last Will and Testament of the above-named decedent, dated _____, be admitted formally to probate.

Executed this _____ day of _____, 20____

Probate Court Judge

SEE ATTACHED ORDER

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this _____ day of _____, 20____

[Handwritten signature]

4550 61 Probate Court Judge

QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Signature: Bessie Huckabee
Name: _____
Address: _____
E-mail: _____
Telephone (O): _____
(H): _____
Signature: _____
Name: _____
Address: _____
E-mail: _____
Telephone (O): _____
(H): _____
Attorney: _____
Address: _____
E-mail: _____
Telephone (O): _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF ALICE SHAW-BAKER

CASE NUMBER 2009ES10-00378

FIDUCIARY LETTERS

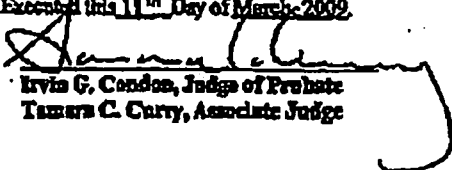
☒ Personal Representative
☐ Conservatorship
☐ Trusteeship
☐

On the 11TH day of March, 2009, HESSIE WYNHAM HUCKABEE was/were appointed and qualified as Fiduciary(ies) of the above matter by this Court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued as evidence of such appointment qualification, and authority of the above fiduciary(ies) to do and to perform all acts which may be authorized by law.

RESTRICTIONS: None

Executed this 11TH Day of March, 2009


Irvin G. Condon, Judge of Probate
Tamera C. Curry, Associate Judge

FORM #1607C (2/70)
62-181, 62-334, 62-341, 62-70-201

6

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE MATTER OF: ALICE SHAW-BAKER

IN THE PROBATE COURT
PROOF OF DELIVERY

CASE NUMBER: 2009-ES-10-0376

On the MARCH day of 12, 2009, I mailed or delivered the following document, INFORMATION TO HEIRS
AND/OR DEVISEES

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
BLANK	BLANK
Bessie Huchabee	North Charleston, SC 29418
Sandra Byrd	Goose Creek, SC 29445
Kay Ponsotaigne	North Charleston, SC 29405
Lisa Fisher, Esquire	Long Beach, CA 90809-1112

SWORN to before me this 12th day of
March, 2009.

Peter A. Kouten
Notary Public for South Carolina
My Commission Expires: 7/24/2013

Signature: [Signature]
Name: PETER A. KOUTEN, ESQ
Address: 7013 DORCHESTER RD, STE E
N CHAS, SC 29418
Telephone (O): 787-5284
(H):
E-mail: PKOUTEN@GMAIL.COM

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

STATE OF SOUTH CAROLINA
COUNTY OF: CHARLESTON
IN THE MATTER OF: ALICE SHAW-BAKER

IN THE PROBATE COURT
INFORMATION TO HEIRS AND DEVISEES

CASE NUMBER: 2009-EB-10-0378

On MARCH 10, 2009, Application/Petition was made to the Probate Court of CHARLESTON County, at (address), 84 BROAD STREET, CHARLESTON, SC 29401, for the (check all that apply):

INFORMAL

☒ PROBATE OF WILL
☒ APPOINTMENT

FORMAL

☐ TESTACY
☐ APPOINTMENT

In the above matter,

(Complete is applicable) The decedent's will dated MAY 21, 2002, and codicil(s) dated N/A, was/were presented.

This notice is being sent to persons who have or may have some interest in the estate.

Bond HAS ☐ HAS NOT ☒ been filed.

My application/petition was granted within the past thirty days on MARCH 10, 2009.

Disclaimer: This form is required to be sent to all potential heirs of the deceased. Receipt of this form does not mean that you will inherit from the deceased. You may review the file in the Probate Court or see an attorney if you desire further information.

Applicant / Personal Representative Name: BESSIE HUCKABEE

Address: _____
North Charleston, SC 29418

Telephone (O): _____
(H): 843-662-2086

Applicant / Personal Representative Name: _____

Address: _____

Telephone (O): _____
(H): _____

Attorney: PETER A. KOUTEN

Address: 7015 DORCHESTER RD, STE E
NORTH CHARLESTON, SC 29418

Telephone: 843-767-5284

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2009-CP-10-3010

BETTY FISHER, etal.,)
Plaintiffs,)

v.)

BESSIE HUCKABEE, etal.,)
Defendants.)

In the Matter of the Estate of)
Alice Shaw-Baker.)
Charleston County Probate No.:)
2009-ES-10-0378)

ANSWER OF DEFENDANTS

BESSIE HUCKABEE, KAY PASSAILAIGUE
AND SANDRA BYRD
(Jury Trial Demanded)

Defendants Bessie Huckabee, Kay Passailaigue and Sandra Byrd answer the complaint of
the Plaintiffs as follows:

**FOR A FIRST DEFENSE
(General Denial)**

1. Defendants admit the allegations of Paragraph 1.
2. Defendants admit the allegations of Paragraph 2 upon information and belief.
3. Defendants admit the allegations of Paragraph 3 upon information and belief
excepting the allegation that Lisa Fisher is currently the Conservator of Alice
Shaw-Baker.
4. Defendants admit the allegations of Paragraph 4.
5. Defendants admit the allegations of Paragraph 5 to the extent that Kay
Passailaigue ("Kay") is a devisee under the May 21, 2001 submitted to the
Probate Court by attorney for Plaintiff and that she is the sole beneficiary of the
National Life Insurance policy and that she is a resident of Charleston County.

EXHIBIT

P

Defendants lack sufficient information to affirm or deny the remaining allegations of Paragraph 5.

6. Defendants admit the allegations of Paragraph 6.
7. Defendants deny the allegations in Paragraph 7.
8. On information and belief, Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 8 regarding the State Budget and Control Board and the South Carolina Retirement System and therefore deny those allegations and demand strict proof thereof.
9. On information and belief, Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 9 regarding ING and the South Carolina Deferred Compensation Program and therefore deny those allegations and demand strict proof thereof.
10. Defendants admit the allegations of Paragraph 10 to the extent that Kay is the sole beneficiary of the National Life Insurance policy and deny the remaining allegations of Paragraph 10 and demand strict proof thereof.
11. Defendants admit the allegations of Paragraph 11.
12. Defendants admit the allegations of Paragraph 12.
13. Defendants admit the allegations of Paragraph 13.
14. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 14.
15. Defendants admit the allegations of Paragraph 15.
16. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 16.

17. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 17.

18. Defendants admit the allegations of Paragraph 18.

19. Defendants admit the allegations of Paragraph 19.

20. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 20.

21. Defendants admit the allegations of Paragraph 21.

22. Defendants admit the allegations of Paragraph 22 to the extent that Alice Shaw-Baker ("Alice") owned at least three Chihuahuas that she cared for and loved and deny the remaining allegations of Paragraph 22 and demand strict proof thereof.

23. Defendants deny that all of Alice's home decor "featured" Chihuahua themes.

24. Defendants deny the allegations of Paragraph 24 and demand strict proof thereof.

25. Defendants admit the allegations of Paragraph 25.

26. Defendants admit the allegations of Paragraph 26.

27. Defendants admit the allegations of Paragraph 27.

28. Defendants admit the allegations of Paragraph 28.

29. Defendants admit the allegations of Paragraph 29.

30. Defendants admit the allegations of Paragraph 30.

31. Defendants admit the allegations of Paragraph 31.

32. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 32 and therefore deny the allegations and demand strict proof thereof.

33. Defendants are currently without sufficient information as to the truth or falsity of the allegations of Paragraph 33 and therefore deny the allegations and demand strict proof thereof.

34. Defendants admit the allegations of Paragraph 34.

35. Defendants admit the allegations of Paragraph 35.

36. Defendants admit the allegations of Paragraph 36 to the extent that Alice executed the Durable Power of Attorney but deny knowledge of the existence of said document and therefore deny the existence of a fiduciary relationship as would exist had Bessie known and accepted the powers and duties of a Durable Power of Attorney.

37. Defendants admit the allegations of Paragraph 37.

38. Defendants admit the allegations of Paragraph 38, to the extent that the Health Care Power of Attorney provided for such in the event that Alice was incapable of acting for herself, an eventuality that never occurred prior to the Court's revocation of said Health Care Power of Attorney.

39. Defendants admit that Alice placed trust and confidence in Bessie and Kay as friends and deny the remaining allegations of Paragraph 39 and demand strict proof thereof.

40. Defendants deny the allegations of Paragraph 40 and demand strict proof thereof.

41. Defendants deny the allegations of Paragraph 41 and demand strict proof thereof.

42. Defendants deny the allegations of Paragraph 42 and demand strict proof thereof.

43. Defendants deny the allegations of Paragraph 43 and demand strict proof thereof.

44. Defendants deny the allegations of Paragraph 44 and demand strict proof thereof.

45. Defendants deny the allegations of Paragraph 45 and demand strict proof thereof.
46. Defendants deny the allegations of Paragraph 46 and demand strict proof thereof.
47. Although Kay is the sole beneficiary of Alice's life insurance, Defendants deny the allegations of Paragraph 47 and demand strict proof thereof.
48. Defendants deny the allegations of Paragraph 48 and demand strict proof thereof.
49. Defendants deny the allegations of Paragraph 49 and demand strict proof thereof.
50. Defendants deny the allegations of Paragraph 50 and demand strict proof thereof.
51. Defendants admit the allegations of Paragraph 51 and that the Petition was resultant from repeated telephone calls regarding Alice, including calls and conversations with Bessie and Kay.
52. Defendants admit the allegations of Paragraph 52.
53. Defendants admit the allegations of Paragraph 53.
54. Upon information and belief, Defendants admit the allegations of Paragraph 54.
55. Defendants deny the allegations of Paragraph 55 that representations were made to induce Alice and that Alice was incapacitated at the timeframe referenced and demand strict proof thereof.
56. Defendants deny the allegations of Paragraph 5 that Plaintiffs Betty Fisher and Lisa Fisher assisted Alice and demand strict proof thereof.
57. Defendants deny the allegations of Paragraph 57 and demand strict proof thereof.
58. Defendants deny the allegations of Paragraph 58 and demand strict proof thereof.
59. Defendants deny the allegations of Paragraph 59 and demand strict proof thereof.
60. Defendants admit the allegations of Paragraph 60.
61. Defendants admit the allegations of Paragraph 61.

62. Defendants admit the allegations of Paragraph 62 to the extent the Lisa Fisher did her duties, for the most part, through agents while she was in California and that attorney John Cooper assisted in the performance of the allegations aforementioned.
63. Defendants deny the allegations of Paragraph 63 and demand strict proof thereof.
64. Defendants admit the allegations of Paragraph 64.
65. Defendants admit the allegations of Paragraph 65.
66. Defendants deny the allegations of Paragraph 66 to the extent that the Court Order states that "Alice Shaw-Baker nor anyone on her behalf may revise or revoke her will" unless specifically ordered by the Court.
67. Defendants deny the allegations of Paragraph 67 and demand strict proof thereof.
68. Defendants deny the allegations of Paragraph 68 and demand strict proof of the existence of a subsequent will.
69. Defendants deny the allegations of Paragraph 69 and demand strict proof thereof.
70. Defendants admit the allegations of Paragraph 70.
71. Defendants admit the allegations of Paragraph 71.
72. Defendants deny the allegations of Paragraph 72 and demand strict proof thereof.
73. Defendants deny the allegations of Paragraph 73 and demand strict proof thereof.
74. Defendants deny the allegations of Paragraph 74 and demand strict proof thereof.
75. Defendants deny the allegations of Paragraph 75 and demand strict proof thereof.
76. Defendants deny the allegations of Paragraph 76 and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S FIRST CAUSE OF ACTION
(Constructive Trust)
(Denial)**

77. Each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim

78. Defendants admit the allegations of Paragraph 78 to the extent the Lisa Fisher holds the estate assets. She has been removed as Conservator of Alice's estate by Court Order.

79. Defendants admit the allegations of Paragraph 79.

80. Defendants admit the allegations of Paragraph 80.

81. Defendants deny the allegations of Paragraph 81 and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S SECOND CAUSE OF ACTION
(Declaratory Judgment Regarding Revocation)
(Denial)**

82. Each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim

83. Answering Paragraphs 83, 84, 85, and 86 Defendant's deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S THIRD CAUSE OF ACTION
(Undue Influence)
(Denial)**

84. Answering Paragraph 87, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim

85. Answering Paragraphs 88, 89, 90, 91, 92, 93, 94 and 95 Defendant's deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S FOURTH CAUSE OF ACTION
(Fraud)
(Denial)**

86. Answering Paragraph 96, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim
87. Answering Paragraphs 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, and 113, Defendant's deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S FIFTH CAUSE OF ACTION
(Declaratory Judgment Regarding Improper Execution)
(Denial)**

88. Answering Paragraph 114, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim
89. Answering Paragraphs 115, 116, and 117, Defendant's deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S SIXTH CAUSE OF ACTION
(Declaratory Judgment Regarding Subsequent Will)
(Denial)**

90. Answering Paragraph 118, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim
91. Answering Paragraphs 119, and 120, Defendant's deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S SEVENTH CAUSE OF ACTION
(Unjust Enrichment)
(Denial)**

92. Answering Paragraph 121, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.
93. Answering Paragraphs 122, 123, 124, 125, 126 and 127, Defendants deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S EIGHTH CAUSE OF ACTION
(Promissory Estoppel)
(Denial)**

94. Answering Paragraph 128, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.
95. Answering Paragraphs 129, 130, 131, 132, and 133, Defendants deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S NINTH CAUSE OF ACTION
(Petition for Removal of Bessie as Personal Representative)
(Denial)**

96. Answering Paragraph 134, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.
97. Answering Paragraphs 135, 136, 137, 138, 139, 140, and 141, Defendants deny and demand strict proof thereof.

**FOR A FIRST DEFENSE TO
PLAINTIFF'S TENTH CAUSE OF ACTION
(Petition for Appointment of Betty Fisher as Personal Representative)**

(Denial)

98. Answering Paragraph 142, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.

99. Defendants admit the allegations of Paragraph 143.

100. Answering Paragraph 144, Defendants deny and demand strict proof thereof

**FOR A FIRST DEFENSE TO
PLAINTIFF'S ELEVENTH CAUSE OF ACTION
(Attorneys' Fees and Costs)
(Denial)**

101. Answering Paragraph 145, each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.

102. Answering Paragraph 146, Defendant's deny and demand strict proof thereof

**FOR A SECOND DEFENSE TO
ALL CAUSES OF ACTION**

103. Each and every of these Defendant's answers are incorporated herein to the same extent as if set forth verbatim.

104. Plaintiff's Complaint should be dismissed for failure to state claims with sufficient facts to constitute causes of actions against Defendants pursuant to Rule 12(B)(6) of the South Carolina Rules of Civil Procedure.

WHEREFORE, Defendants Bessie Huckabee, Kay Passailaigue and Sandra Byrd pray that

- a. the Complaint of the Plaintiffs be dismissed with costs;

- b. that the Defendants seek a jury trial in the event the actions are not dismissed; and
- c. any such other relief as the Court may deem just and proper.



Peter A. Kouten, Esquire
Kouten Law Firm, LLC
7013 Dorchester Road, Suite E
North Charleston, SC 29418
843-767-5284

Attorney for Defendants
Bessie Hockabee, Kay Passailaigue
And Sandra Byrd

May 27, 2009
Charleston, S.C.

35 R 267PG092

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

GENERAL DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That I, ALICE E. SHAW-BAKER, do hereby constitute and appoint BESSIE HUCKABEE, of Charleston County, South Carolina, my true and lawful attorney for me and in my name and stead. I designate my aforesaid attorney in fact to exercise the right to exercise the within powers;

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a.c.s.B

1. To enter upon and take possession of any lands, buildings, tenements, or other structures, or any part or parts thereof, that may belong to me, or to the possession whereof I may be entitled;

2. To ask, collect and receive any rents, profits, issues, or income, of any and all of such lands, buildings, tenements, or other structures, or any part or parts thereof;

3. To make, execute and deliver any deed, mortgage, or lease, whether with or without covenants and warranties, in respect of any such lands, buildings, tenements, or other structures, or any part or parts thereof, that may now or hereafter be erected upon any such lands;

4. To demand, sue for, collect, recover and receive all goods, claims, debts, monies, interest and demands whatsoever now due, or belong to me (including the right to institute any action, suit, or legal proceeding, for the recovery of any land, buildings, tenements, or other structures, or any part or parts thereof, to the possession whereof I may be entitled), and to make, execute and deliver receipts, releases, or other discharges therefore, under



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seal or otherwise;

5. To make, execute, endorse, accept and deliver any and all bills of exchange, checks, drafts, notes and trade acceptances;

6. To pay all sums of money, at any time or times, that may hereinafter be owing by me upon any bill of exchange, check, draft, note or trade acceptance, made, executed, endorsed, accepted and delivered by me, or for me, or in my name, by my said attorney;

7. (A) To deposit or withdraw for any purpose, in or from any bank or other financial institution, any funds, checks, or other credits which I now or hereafter may have on deposit or be entitled to, and to endorse, cash and receive the proceeds of any and all checks, drafts, vouchers, or other orders for the payment of money;

(B) To write checks or drafts upon, or make other orders for the payment of money from any account at any bank or financial institution now or hereafter standing in my name or jointly in my name and another's name (except those accounts which I hold as a trustee or in other fiduciary capacities);

(C) To open or close accounts, and to receive statements, notices, or other documents from any bank or other financial institution concerning any and all accounts or banking transactions in my name or in which I may have an interest;

(D) To have access for all purposes to any or all safety deposit boxes or vaults rented in my name or in the names of any other person or persons and myself, with full power to use the same for safekeeping any property or papers, and to remove therefrom at

any time, all or any part of the contents of any such box or vault or to surrender the possession of any such box or vault;

(E) To borrow money for such periods and upon such terms as my attorney shall deem proper and to execute in my name any instrument evidencing indebtedness incurred on my behalf and to extend, modify and renew the same, as well as any indebtedness heretofore incurred by me, for the payment of which I may in any way be liable, and to mortgage or pledge any and all of my personal or real property as security for any such indebtedness.

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Without limiting in any way the right of third parties to rely on actions by my Attorney-in-Fact, I do hereby declare as between me and my Attorney-in-Fact, a fiduciary relationship exists and that my Attorney-in-Fact shall not satisfy her legal obligations out of any property subject to this Power of Attorney, nor may my Attorney-in-Fact exercise this Power in favor of herself, her creditors, or the creditors of her estate.

8. To sell any and all shares of stock, bonds, or other securities now, or hereafter, belonging to me, that may be issued by any association, trust, or corporation, whether private or public, to make, execute and deliver any assignment securities, and to vote said shares of stock;

9. To defend, settle, adjust, compound, submit to arbitration and compromise all actions, suits, accounts, reckonings, claims and demands, whatsoever, that now are, or hereafter shall be, pending between me and any person, firm, or corporation in such manner and in all respects as my said attorney

shall think fit;

10. To sell, either at public or private sale, or exchange any part or parts of my real estate or personal property for such consideration and upon such terms as my attorney shall think fit, and to execute and deliver good and sufficient deeds, or other instruments for the conveyance or transfer of the same, with such covenants of warranty or otherwise as my attorney shall see fit, and to give good and effectual receipts for all or any part of the purchase price or other consideration;

11. To carry on or to wind up any business, and in connection therewith to use the premises in which the same is or shall be carried on, with the same powers of dealing with stock, capital, and effects, and of entering into business engagements, of increasing and diminishing capital and generally of transacting the affairs of the said business as I myself have or should have;

12. To engage, employ and dismiss any agents, clerks, servants, or other persons in and about the performance of these presents as my attorney shall think fit;

13. To exercise any powers and any duties vested in me, whether solely or jointly, with any other or others as executor, administrator, or trustee or in any other fiduciary capacity, so far as such power or duty is capable of being validly delegated;

14. To pay every month the sum required to meet my ordinary household expenses.

15. To prepare, sign and file an Income Tax Return or Declaration of Estimated Tax elected to be filed under the Internal

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Revenue Code for any taxable year during the period this Power of Attorney continues to be in effect. Also, to represent me before any office of the Internal Revenue Service with respect to any and all Internal Revenue tax matters and any and all years of periods.

To receive confidential information and to have full power to perform, on my behalf, the following acts with respect to any matter as to which this Power of Attorney shall apply:

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(i) To receive, and to endorse and collect, checks in payment of any refund of Internal Revenue taxes, penalties, or interest;

(ii) To execute waivers (including offers of waivers) or restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund;

(iii) To execute consents extending the statutory period for assessment or collection of taxes; and

(iv) To delegate authority or to substitute another representative.

16. To enter, make, sign, execute and deliver, acknowledge and perform any contract, agreement, writing, or thing that may, in the opinion of my attorney, be necessary or proper to be entered into, made, or signed, sealed, executed, delivered, acknowledged, or performed; and

17. Without, in anywise, limiting the foregoing, generally to do, execute and perform any other act, deed matter, or thing, whatsoever, that ought to be done, executed and performed or that

in the opinion of my said attorney ought to be done, executed, or performed, in or about the premises, of every nature and kind, whatsoever, as fully and effectually as I could do if personally present.

18. To substitute and appoint in her place and stead (on such terms and at such salary or compensation as she shall think fit) one or more attorney or attorneys to exercise for me as my attorney or attorneys any or all of the powers and authorities hereby conferred, and to revoke any such appointment from time to time, and to substitute or appoint any other or others in the place of such attorney or attorneys as she shall from time to time think fit.

19. Any provision of this instrument found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the rest of this instrument;

20. The Power of Attorney expressed herein shall continue indefinitely at the pleasure of Alice E. Shaw-Baker.

21. This Power of Attorney shall not be affected by physical disability or mental incompetence of the principal, which renders the principal incapable of managing her own estate. The authority conferred shall be exercisable notwithstanding physical disability or mental incompetence. All acts done by the attorneys-in-fact pursuant to the power during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind the principal or her heirs, devisees, legatees, and personal representative as if the principal were mentally competent

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and not disabled.

22. My attorney named herein is hereby authorized to appoint a successor to herself in the event she should decide that she is no longer capable of acting or does not wish to act as attorney and said successor may be appointed whether or not I am then physically disabled or mentally incompetent.

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal this

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a. 5/3

5 day of April, 1996.

Cheryl Hotchkiss
N. Edward Horowitz

Alice E. Shaw-Baker
ALICE E. SHAW-BAKER

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me CHERYL HOTCHKISS and made oath that (s)he saw the within named ALICE E. SHAW-BAKER, sign, seal and as her act and deed, deliver the within instrument for uses and purposes therein mentioned, and that (s)he with N. EDWARD HOROWITZ witnessed the due execution thereof.

SWORN to before me this

5th day of April, 1996.

N. Edward Horowitz SEAL
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 10/20/99

I, ALICE E. SHAW-BAKER, the Principal, sign my name to this instrument this 5 day of April, 1996, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Power of Attorney and that

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I sign it willingly; that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Alice E. Shaw-Baker
ALICE E. SHAW-BAKER

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WE, CHERYL HOTCHKISS and N. EDWARD HOROWITZ the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that ALICE E. SHAW-BAKER, the Principal, signs and executes this instrument as her Power of Attorney and that she signs it willingly, and that each of us, in the presence and hearing of the Principal, hereby signs this Power of Attorney as witness to the Principal's signing, and that to the best of our knowledge the Principal is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Cheryl Hotchkiss
N. Edward Horowitz

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Subscribed, sworn to, and acknowledged before me by ALICE E. SHAW-BAKER, the Principal, and subscribed and sworn to before me by CHERYL HOTCHKISS, witness, this 5th day of April, 1996.

M. Edward Horowitz SEAL
NOTARY PUBLIC FOR SOUTH CAROLINA.
MY COMMISSION EXPIRES: 10/20/99

N. EDWARD HOROWITZ
ATTORNEY AT LAW
1050 ST. ANDREWS BOULEVARD
P. O. BOX 31914
CHARLESTON, SC 29417-1914

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

DURABLE POWER OF ATTORNEY
FOR HEALTH CARE

INFORMATION ABOUT THIS DOCUMENT:

This is an important legal document, before signing this document, you should know these important facts:

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1. This document gives the person you name as your agent the power to make health care decisions for you if you cannot make the decision for yourself. This power includes the power to make decisions about life-sustaining treatment. Unless you state otherwise, your agent will have the same authority to make decisions about your health care as you would have.

2. This power is subject to any limitations or statements of your desires that you include in this document. You may state in this document any treatment you do not desire or treatment you want to be sure you receive. Your agent will be obligated to follow your instructions when making decisions on your behalf. You may attach additional pages if you need more space to complete the statement.

3. After you have signed this document, you have the right to make health care decisions for yourself if you are mentally competent to do so. After you have signed this document, no treatment may be given to you or stopped over your objection if you are mentally competent to make that decision.

4. You have the right to revoke this document, and terminate your agent's authority, by informing either your agent or your health care provider orally or in writing.

5. If there is anything in this document that you do not understand, you should ask a social worker, lawyer, or other person to explain it to you.

6. This Power of Attorney will not be valid unless two persons sign as witnesses. Each of these persons must either witness your signing of the Power of Attorney or witness your acknowledgment that the signature on the Power of Attorney is yours.

The following persons may not act as witnesses:

A. Your spouse; your children, grandchildren, and other lineal descendants; your parents, grandparents, and other lineal ancestors; your siblings and their lineal descendants; or a spouse of any of these persons.

B. A person who is directly financially responsible for



your medical care.

C. A person who is named in your will, or if you have no will, who would inherit your property by intestate succession.

D. A beneficiary of a life insurance policy on your life.

E. The persons named in the Health Care Power of Attorney as your Agent or Successor Agent.

F. Your physician or any employee of your physician.

G. Any person who would have a claim against any portion of your Estate (Persons to whom you owe money).

If you are a patient in a health facility, no more than one witness may be an employee of that facility.

7. Your agent must be a person who is 18 years old or older and of sound mind. It may not be your doctor or any other health care provider that is now providing you with treatment; or any employee of your doctor or provider; or a spouse of the doctor, provider, or employee; unless the person is a relative of yours.

8. You should inform the person that you want him or her to be your health care agent. You should discuss this document with your agent and your physician and give each a signed copy. If you are in a health care facility or a nursing care facility, a copy of this document should be included in your medical record.

HEALTH CARE POWER OF ATTORNEY

I, ALICE E. SHAW-BAKER, (sometimes hereinafter referred to as the Principal) of Charleston County, State of South Carolina, do hereby appoint BESSIE HUCKABEE, my friend, [REDACTED], Charleston, South Carolina 29418, home telephone number [REDACTED], work telephone number NONE, as my Attorney-in-Fact (or Agent) to make health and personal care decisions for me as authorized in this document. By this document I intend to create a Durable Power of Attorney for Health Care pursuant to Section 62-5-501 of the South Carolina Probate Code as may be amended from time to time. If no Agent designated in this document is available or able to serve, I request that my desires as expressed in this document be given full force and effect as a written expression of intent under applicable law. I desire that my wishes as expressed herein be carried out through the authority given to my Agent by this document despite any contrary feelings, beliefs, or opinions of members of my family, relatives, friends, conservator, or guardian.

1. EFFECTIVE DATE AND DURABILITY. This Durable Power of Attorney for Health Care shall not be affected by physical disability or mental incompetence of mine which renders me incapable of managing my own estate. The rights, powers and authority hereto granted to my Agent shall commence and be in full force and effect after the date hereof, and such rights, power and authority shall remain in full force and effect thereafter until I give notice that such power is terminated.

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a e s b

2. AGENT'S POWERS. I grant to my Agent full authority to make decisions for me regarding my health care. In exercising this authority, my Agent shall follow my desires as stated in this document or otherwise known to my Agent. In making any decision, my Agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my Agent cannot determine the choice I would want made, then my Agent shall make a choice for me based upon what my Agent believes to be in my best interest. My Agent's authority to interpret my desires is intended to be as broad as possible. Accordingly, unless specifically limited by either Section H of this Paragraph 2 or by Paragraph 4 hereof, my Agent is authorized as follows:

A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;

B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;

C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;

D. To have access to medical records and information to the same extent that I am entitled to, including the right to disclose the contents to others;

E. To contract on my behalf for placement in a health care or nursing care facility or for health care related services, without incurring personal financial liability for the contract;

F. To hire and fire medical, social service, and other support personnel responsible for my care; and

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a e s b

G. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my Agent, or to seek actual or punitive damages for the failure to comply.

H. The powers granted above do not include the following powers or are subject to the following rules or limitations:

3. ORGAN DONATION (INITIAL ONLY ONE)

My Agent may _____; may not a e s b consent to the donation of all or any of my tissue or organs for purposes of transplantation.

4. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL). I now have in effect a Declaration of a Desire for a Natural Death (a "Living Will") dated None, 19____ (executed prior to this instrument). I direct that the instructions as contained in my Living Will, as may be amended or supplemented from time to time, will be given effect in any situation to which they are applicable. My Agent will have authority to make decisions concerning my health care only to the extent the Living Will does not apply.

5. STATEMENT OF DESIRES AND SPECIAL PROVISIONS.

With respect to any Life-Sustaining Treatment, I direct the following: (INITIAL ONLY ONE OF THE FOLLOWING 4 PARAGRAPHS)

- (1) _____ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense

involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

- Page 5
a.e.s.b.
- (2) a.e.s.b. DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

(a) If I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

(b) If I am in a state of permanent unconsciousness.

- (3) _____ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

OR

- (4) _____ DIRECTIVE IN MY OWN WORDS:
- _____
- _____
- _____

6. STATEMENT OF DESIRES REGARDING TUBE FEEDING.

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that (INITIAL ONLY ONE)

a.e.s.b. I do not want to receive these forms of artificial nutrition and hydration, and they may be withheld or withdrawn under the conditions given above.

OR

I do want to receive these forms of artificial nutrition and hydration.

IF YOU DO NOT INITIAL EITHER OF THE ABOVE STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

7. SUCCESSORS. If the Agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or (if an Agent is my spouse) is divorced from me or separated from me under the circumstances stated in South Carolina Code 20-7-743(2), I name the following as successors to my Agent, each to act alone and successively, in the order named. The word "Agent" in this document includes a Successor Agent who has assumed authority to act pursuant to this section.

First Alternate Agent: Kay Passailaigue Slade
Address: [REDACTED] North Charleston,
SC 29405

Telephone: [REDACTED]

Second Alternate Agent: None

Address: _____

Telephone: _____

8. ADMINISTRATIVE PROVISIONS.

A. I hereby revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. The laws of the State of South Carolina shall govern this document in all respects, including its validity, construction, interpretation, and termination, and shall be used to determine the validity of acts taken under authority granted in this document. I intend for this Durable Power of Attorney for Health Care to be honored in any jurisdiction where it may be presented and for any such jurisdiction to refer to South Carolina law to interpret and determine the validity of this document and any of the powers granted under this document.

C. My Agent shall not be entitled to compensation for services performed under this Health Care Power of Attorney, but he or she shall however be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out this Health Care Power of Attorney.

D. The powers delegated under this power of

attorney are separable, so that the invalidity of one or more powers shall not affect any others.

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9. PROTECTION OF MY AGENT AND THIRD PARTIES WHO RELY ON MY AGENT. No individual, organization, or entity (including but not limited to any physician, hospital, nursing home, insurer, or other party) who relies in good faith upon a person's representation that he or she is the person named as my Agent or who relies in good faith on a health care decision made by my Agent shall neither be subject to disciplinary action nor shall be liable to me, my estate, my heirs or assigns, for recognizing the Agent's authority or relying on the decision. No Agent who in good faith makes a health care decision pursuant to the authority granted herein shall be liable to me, my estate, my heirs or assigns, on account of the substance of the decision.

10. UNAVAILABILITY OF AGENT

If at any relevant time the Agent or Successor Agents named herein are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

11. NOMINATION OF REPRESENTATIVE. To the extent that I am permitted by law to do so, I hereby nominate my Agent to serve as my guardian, conservator or in any similar representative capacity, and if I am not permitted by law to so nominate then I request in the strongest possible terms that any court of competent jurisdiction which may receive and be asked to act upon a petition by any person to appoint a guardian, conservator or similar representative for me give the greatest possible weight to this request.

If my Agent is unwilling or unable to serve or to continue to serve in such capacity then I nominate my alternate Agents to serve in such capacity in the order that I have named them in this document, and if I am not permitted by law to so nominate, then I request in the strongest possible terms that any court of competent jurisdiction which may receive and be asked to act upon a petition by any person to appoint a guardian, conservator or similar representative for me to give the greatest possible weight to this request.

BY SIGNING HERE, I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

IN WITNESS WHEREOF, I sign this Durable Power of Attorney

for Health Care on this 5 day of April, 1996.

Alice E. Shaw-Baker
ALICE E. SHAW-BAKER, Principal

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

We, CHERYL HOTCHKISS, and N. EDWARD HOROWITZ, the undersigned witnesses to the foregoing Durable Power of Attorney for Health Care, dated the _____ day of _____, 1996, at least one of us being first duly sworn, declare to the undersigned authority, on the basis of our best information and belief, that the foregoing instrument was on that date signed by the Principal as and for her DURABLE POWER OF ATTORNEY FOR HEALTH CARE in our presence and we, at her request and in her presence, and in the presence of each other, subscribe our names as witnessed on that date. The Principal is personally known to us, and we believe her to be of sound mind. Each of us affirms that he/she is qualified as a witness to this instrument under the provisions of the South Carolina Death With Dignity Act in that he/she is not related to the Principal by blood, marriage, or adoption, either as a spouse, lineal ancestor, descendant of the parents of the Principal, or spouse of any one of them; nor directly financially responsible for the Principal's medical care; nor entitled to any portion of the Principal's estate upon her decease, whether under any Will or as an heir by intestate succession; nor the beneficiary of a life insurance policy of the Principal; nor the Principal's attending physician; nor an employee of the attending physician; nor a person who has a claim against the Principal's decedent's estate as of this time. None of us is an employee of a health facility. The Principal is not a resident in a hospital or nursing care nursing facility at the date of the execution of this Durable Power of Attorney for Health Care.

Page 8
AC 50

N. Edward Horowitz
WITNESS
954 S. Highland Ct., Mt. Pleasant, SC
ADDRESS
(803) 884-0137
TELEPHONE NUMBER

Cheryl Hotchkiss
WITNESS
101 Glebe Rd., Summerville, SC
ADDRESS
871-6765
TELEPHONE NUMBER

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named ALICE E. SHAW-BAKER,

Chrysothamnus

5th day of April, 1996.

page
AE-58

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF
COMMON PLEAS

ORIGINAL

ALICE SHAW BAKER, ET AL)
PLAINTIFFS)
vs.)
BESSIE HUCKABEE, ET AL)
DEFENDANTS)

TRANSCRIPT OF RECORD

2009-CP-10-3010

BETTY FISHER,)
PLAINTIFF)
vs.)
BESSIE HUCKABEE,)
DEFENDANT)

2012-CP-10-1332

NOVEMBER 28, 2012
CHARLESTON, SC

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR.

A P P E A R A N C E S:

JOHN HUGHES COOPER, ESQUIRE
LISA FISHER, ESQUIRE
ATTORNEYS FOR PLAINTIFFS

PETER A. KOUTEN, ESQUIRE
ATTORNEY FOR DEFENDANT

SHARON D. JONES
OFFICIAL COURT REPORTER

1 at this real quick --

2 MR. KOUTEN: Thank you.

3 THE COURT: -- if you don't mind. And then I'll
4 be glad to hear from you.

5 MR. KOUTEN: I would appreciate that.

6 THE COURT: Okay.

7 MR. KOUTEN: That would help a lot.

8 (Pause.)

9 THE COURT: Okay. I'll be glad to hear you.

10 MR. KOUTEN: Thank you, Your Honor. Your Honor,
11 the motion for summary judgment and dismissal of action
12 were based on a couple of defects, one being
13 jurisdiction and one being standing of the plaintiffs.

14 The first issue regarding jurisdiction is that
15 the South Carolina Probate Code indicates that they
16 have exclusive original jurisdiction for all matters
17 affecting estates. There is concurrent jurisdiction
18 for wrongful death and survival action. Wrongful death
19 and survival is not pled in the pleadings. No elements
20 in there indicating that it's a wrongful death or
21 survival action. And, therefore, this originates in
22 the wrong court.

23 Surely the parties, by statute, may bring an
24 action in the probate court and then move to the
25 circuit court under certain conditions. And I'm sure

1 court look at Mr. Kouten's original motion for summary
2 judgment, and in comparison to the memorandum that he
3 has filed today, these issues about standing and
4 jurisdiction were not raised in the original document.
5 There is a brief reference, I believe, in the original
6 motion to standing, but not jurisdiction.

7 My return clearly indicates that Betty Fisher
8 has standing. First and foremost, Bessie Huckabee
9 certainly is not going to bring this action against
10 herself. There is a potential statute problem if it
11 were to be allowed to go on any further. That's part
12 of the reason that Ms. Fisher brought the action at
13 this time.

14 Under the legal authority -- and this is on page
15 eight of my return, under Duke v. Postal Telegraph
16 Cable Company, 71 SC 95. It indicates that heirs at
17 law are the real representatives. And under South
18 Carolina code section 15-5-90, claims survive both to
19 and against the personal or real representative.

20 So what's happening right now, because of the
21 interim time, Betty Fisher has filed this action to
22 preserve the statute, to ensure that those who have
23 wronged Alice Shaw Baker are held accountable. And she
24 has standing to do that as real representative. That's
25 why under the standing issue, she certainly is able to

1 bring this action.

2 Under the jurisdictional issue, this is a
3 survival action. This isn't a -- it's -- they are not
4 the same cases. The Code and case law is very clear
5 that --

6 THE COURT: So you think 1332 is a survival
7 action? Is that what you're saying?

8 MS. FISHER: It is a survival action, yes, sir.

9 THE COURT: What are the other actions, wrongful
10 death?

11 MS. FISHER: No. It's just a survival action --
12 I'm sorry, are you talking about the will contest or
13 1332?

14 THE COURT: No. I was talking about the other
15 case, 13 -- 3010, is that a will contest?

16 MS. FISHER: 1332 is a --

17 THE COURT: I'm sorry. Excuse me. 3010, what is
18 that?

19 MS. FISHER: That's a will contest.

20 THE COURT: Well, how do you have a will contest
21 if it's never been litigated in probate court -- but
22 that's separate?

23 MS. FISHER: Right. It was moved to the Circuit
24 Court, Your Honor. And there is pending litigation.
25 That's why the motion -- we have the consent scheduling

1 or incorrect?

2 MS. FISHER: It's both. And I'll explain to you
3 why, Your Honor. Normally, a personal representative
4 would have that power, but if a personal representative
5 doesn't take that action, then an heir at law can. And
6 that would include Betty Fisher. And that's --

7 THE COURT: Have they been afforded the
8 opportunity to take the action?

9 MS. FISHER: Well, there's a statute --

10 THE COURT: On that particular point, what -- what
11 are you basing that point on? In other words, my
12 question is this: I understand if a personal
13 representative has a cause of action, and one of the
14 heirs ask the personal representative to bring it, and
15 they refuse to bring it, and it's a valid cause of
16 action, then you would move before the probate court
17 either removing the personal representative or ordering
18 the personal representative to move forward with the
19 action.

20 In this case, I understand you're asking her to
21 sue herself and that's not going to happen. But I
22 don't think you just can walk in the court and do it
23 without going through the Probate Court and asking the
24 Probate Court to order the personal representative to
25 take action -- or basically you can't order them to

1 take action, but you can -- you can have them removed
2 for failure to take action, is that right or wrong?

3 MS. FISHER: I think it's incomplete.

4 THE COURT: Okay.

5 MS. FISHER: I would not want to say that you're
6 wrong, Your Honor.

7 THE COURT: Okay.

8 MS. FISHER: But it's incomplete.

9 THE COURT: I mean, we're talking about
10 procedurally how this should be done. And I'm not sure
11 I agree with how you have done it. But go ahead.

12 MS. FISHER: Well, you know, Your Honor, we filed
13 the will contest. The procedural issues have been
14 raised and there's been appeals.

15 THE COURT: Okay.

16 MS. FISHER: Now, what do you do to preserve a
17 case if there's statutory authority, which there is, if
18 there's legal authority, under Duke, which there is, an
19 heir at law can bring it. You do not have to go to the
20 Probate Court to do this.

21 Now, whether in the long run, the -- a personal
22 representative will be able to be substituted in after
23 the will contest, that may be right. But the only way
24 to preserve this action, the only way to make sure that
25 the statute wasn't lost, that Alice Shaw Baker's rights

1 legislature certainly knew that they could use only the
2 language personal representative. But its accepted
3 practice -- and it has to be accepted practice, because
4 then a personal representative --

5 THE COURT: It may be accepted practice, but it's
6 not the routine practice. Okay?

7 MS. FISHER: Yes, I understand that.

8 THE COURT: Okay.

9 MS. FISHER: I absolutely do.

10 THE COURT: It may be accepted, but it's not the
11 routine practice.

12 MS. FISHER: Yes. And I mean no disrespect by
13 saying that, I'm just saying that because it's not
14 routine, doesn't mean that she doesn't have standing.
15 And clearly, the issue of standing is important, but we
16 have established that there are facts -- triable issues
17 of fact which need to be addressed in this case, in
18 which have been addressed by the affidavits of Attorney
19 Mark -- I'm sorry -- Hardy, David Kessler, Candy
20 Ripworth (ph) and my affidavit, all raising triable
21 issues of fact. So under those things, there is a
22 triable issue of fact.

23 The issue of standing under this code, raises
24 the inference that Betty Fisher has standing. It may
25 not be routine, but it is accepted and she has standing

1 by the Probate Court. This happened from October 2008
2 through her death in February of 2009. There was never
3 a period of time when he did not represent her.

4 He was never discharged. He acted in a variety
5 -- in all of those capacities, both under the Rules of
6 Professional Conduct and the principals of -- in
7 Townsend vs. Townsend, which is case 323 SC 309, this
8 creates a non waive-able conflict of interest.

9 During the period -- during Alice's life, we
10 allege, and during her -- after her death, he has
11 represented Kuckabee, Slade and Byrd. These
12 individuals have adverse interest to Alice Shaw Baker's
13 true intentions with her regard to her estate.

14 Her estate was supposed to go to animal
15 charities. They knew that. He's continued to act
16 during the time he was counsel for Alice Shaw Baker.
17 He -- we have alleged in the complaint that he -- I'm
18 sorry -- I lost track -- that he obtained confidential
19 information from Alice Shaw Baker and it imposes a
20 problem. These conflicts create non waive-able
21 conflicts in the duty of loyalty and confidentiality --

22 **THE COURT:** The Townsend case, was that
23 appealed -- was that case put out as a result of a
24 professional misconduct or was that put out on a motion
25 where somebody asked someone to be removed, the facts

1 of it?

2 MS. FISHER: Yeah. My recollection is that
3 Townsend involved the representative of the child
4 during the time there was a spousal issue.

5 THE COURT: Conflict of interest, representing a
6 father who had previously served as guardian for the
7 minor child. But did it arise out of professional
8 misconduct or was there someone -- a motion such as
9 this, to have an attorney removed?

10 MS. FISHER: My recollection is it was a motion to
11 remove.

12 THE COURT: Okay. Do you agree with that?

13 MS. FISHER: In the event the Court -- excuse
14 me -- I didn't hear you, Your Honor.

15 THE COURT: Do you agree with that?

16 MR. KOUTEN: I do not, Judge. The court indicated
17 to the attorney --

18 THE COURT: Was the -- was the opinion published
19 as a result of professional misconduct or was it a
20 motion to have an attorney removed?

21 MR. KOUTEN: It was not professional misconduct.

22 THE COURT: What was it?

23 MR. KOUTEN: It was -- from my reading of the
24 case, Judge, the -- the attorney was appointed as
25 guardian ad litem for the child in a prior proceeding.

1 Then during the divorce action, he went to represent
2 the husband. The court said you can't -- you can't do
3 that. It's a family court matter --

4 -- THE COURT: How did it come up?

5 MR. KOUTEN: The -- the attorney asked for
6 reconsideration. And the court said, you don't have
7 standing for reconsideration because you're not the
8 guy, but since this is important to the bench and bar,
9 we're going to go through and explain the distinction
10 here and why a guardian ad litem for a child in a
11 family court setting, in a custody issue, is not
12 appropriate. So it's really not on point in this case.

13 THE COURT: I understand.

14 MR. KOUTEN: But those are the facts.

15 THE COURT: Ms. Fisher, let me -- let me just ask
16 you this question: I don't know if it -- what he has
17 done is a violation of professional ethics or not. I'm
18 not going to delve into that, but that's an issue to be
19 dealt with, with the BAR and the Supreme Court.

20 Why -- assuming, for purposes of my question,
21 that it is professional misconduct, why does that give
22 this court authority to have him removed? And what
23 basis are you asking me to have him removed?

24 MS. FISHER: Well, Your Honor, if there is a
25 conflict of interest, they have -- he has to be

1 removed.

2 THE COURT: Well --

3 MS. FISHER: He's continuing to represent --

4 THE COURT: But that's Bessie Huckabee's
5 problem --

6 MS. FISHER: No.

7 THE COURT: Not yours.

8 MS. FISHER: It is not. It's Alice Shaw Baker's.

9 THE COURT: It seems like the interest would be
10 between Bessie Huckabee and him, not your client.

11 MS. FISHER: No, Your Honor.

12 THE COURT: Why?

13 MS. FISHER: It really doesn't, because the
14 conflict adversely affects Alice Shaw Baker's estate
15 and Townsend does discuss that. I have the case in
16 front of me right here, so I can glance at it,
17 discusses why the conflict is there.

18 The lawyer lacks standing to make the argument.
19 A lawyer who has formerly represented a client in
20 matters shall not thereafter represent another person
21 in the same or substantially related matter in which
22 the person's interests are materially adverse to the
23 interest of the former client --

24 THE COURT: But that's just telling -- that's just
25 warning the BAR about conduct, not removal.

1 MS. FISHER: Well, yes -- no, Your Honor, it's
2 about disqualification. He's disqualified to act --

3 THE COURT: Well, he didn't have standing because
4 he was no longer the guardian. He was acting as
5 attorney. That's the issue.

6 MS. FISHER: Well, Your Honor, the issue --

7 THE COURT: There was a standing issue.

8 MS. FISHER: The issue actually is about his
9 ability to represent. And his ability to represent is
10 significant because it -- it allows -- I'm trying to
11 find the language -- if -- this is in the context of
12 children, but all you have to do is replace decedent --
13 "if children or their parents knew the guardian might
14 later use the information gathered from an
15 investigation to -- and the position that might be
16 detrimental to the children, all parties might be even
17 more reluctant to discuss matters candidly". That's
18 talking about the policy reasons for it.

19 But it also relates to a motion for
20 disqualification. This court's assertion that it had
21 nothing to do with Alice Shaw Baker is wrong. If Alice
22 Shaw Baker was alive, he would have had to have written
23 consent from Alice to represent these people. She's
24 deceased, so she can't ever give consent for him to
25 represent.

1 And I'm asking this court to look at it as if
2 she were alive, would -- would the court say it doesn't
3 matter then? I don't think so. I think that this
4 court has to look at it as Alice Shaw Baker's interests
5 still matter. They still matter. It's still a
6 survival action --

7 THE COURT: But -- but how does that affect you,
8 your client, Betty Fisher?

9 MS. FISHER: Because he obtained information -- he
10 represented her --

11 THE COURT: He represented Betty Fisher?

12 MS. FISHER: No. No. I'm sorry, Alice Shaw
13 Baker.

14 THE COURT: Well, how does that affect you?

15 MS. FISHER: It's affects us because he is
16 representing an adverse interest. It affects Alice
17 Shaw Baker. That -- he doesn't get to use his position
18 as court appointed attorney to obtain a case, continue
19 in a case after he has taken -- obtained information,
20 represented them during Alice's life. That's a
21 significant conflict --

22 THE COURT: I don't disagree it may be a violation
23 of professional ethics. I don't know. But you're
24 asking me to remove him from a case.

25 MS. FISHER: Right.

1 THE COURT: That's a different horse.

2 MS. FISHER: Well, Your Honor, that's what motions
3 for disqualification are about. It -- it -- you know,
4 he had a duty to Alice Shaw Baker. That was his first
5 duty.

6 THE COURT: I don't doubt that --

7 MS. FISHER: Right --

8 THE COURT: -- I don't disagree with that. But my
9 question is, how do you cross the hurdle to Betty
10 Fisher?

11 MS. FISHER: It's not about Betty Fisher. It's
12 about --

13 THE COURT: Well, Betty Fisher is the one who is
14 asking him to be removed.

15 MS. FISHER: Well, Betty Fisher is acting in dual
16 capacities here. She is asking on behalf of -- it's a
17 will contest. He can't represent them in that action,
18 Your Honor. He obtained information. He is a witness
19 during that period of time. He represented adverse
20 interests. He advised them as to actions they took
21 during her life, which although not relevant at this
22 moment, still show that he was having a dual
23 relationship. And that matters to Alice Shaw Baker.
24 He doesn't get to continue on to represent people with
25 adverse interests. He will be called as a witness and

1 his actions adversely affect the estate, Your Honor.
2 It's just not -- you can't -- it's common knowledge
3 that an attorney can't represent another person.

4 So if you want to set aside the Rules of
5 Professional Conduct for the moment, I would say this:
6 It's -- the accepted practice, if you just accept that
7 claim that an attorney doesn't get to represent
8 conflicting interests, and would the court take the
9 same position if she were alive. And that's really
10 the -- the question I'm asking, can you do that? I
11 don't think you can. If there is a conflict, that
12 conflict absolutely demands that he be removed.

13 THE COURT: Okay. All right. Anything else?

14 MR. KOUTEN: Judge, I have --

15 THE COURT: I'm going to hear you in a second.
16 Anything else, Ms. Fisher?

17 MR. KOUTEN: I'm sorry.

18 MS. FISHER: If the court will give me one moment,
19 yes. Just one moment here.

20 (Pause.)

21 MR. COOPER: Your Honor, might I point out that in
22 the Townsend v. Townsend case -- and I'm reading from
23 the first page here in the factual background. It does
24 say that after learning -- "after learning the lawyer
25 had served as guardian ad litem for daughter in a

1 custody proceeding a few years earlier, the Judge, on
2 her own motion, removed lawyer as father's counsel and
3 stopped the hearing". So in other words, apparently
4 this -- this case, Townsend v. Townsend, was on the
5 Judge's own motion.

6 MS. FISHER: I'm sorry, Your Honor. With regard
7 to laws governing disqualification, the courts consider
8 the Rules of Professional responsibility. They
9 consider the conflict that happens. A lawyer cannot
10 represent a client if representation is adverse to
11 another client's interests, unless both clients
12 consent. Cannot. And if the court allows him to
13 continue on, when there was an adverse interest, it's a
14 wrong that Alice Shaw Baker's estate suffers.

15 And even though she's deceased, it does matter.
16 You have to remember that Betty Fisher is standing here
17 on behalf of Alice Shaw Baker. You know it -- Alice
18 Shaw Baker was a citizen of South Carolina. She loved
19 the state. And laws should apply to her as well. It's
20 not okay for an attorney to use his position as court
21 appointed counsel, and thereon continue to represent
22 people with an adverse position --

23 THE COURT: I understand your position. Thank you
24 very much. Mr. Kouten, I'll be glad to hear you.

25 MR. KOUTEN: Thank you, Your Honor. Back to that

1 Townsend v. Townsend case, Judge, the point that was
2 made was the confidential information received in the
3 representation of one, if able to adversely affect the
4 representation of person two, then that's a conflict.
5 Okay. And that's the point that Townsend makes. But I
6 don't think we can go as far as saying just replace the
7 child with decedent. That's not what that Judge was
8 saying.

9 The Judge in that case was indicating that this
10 is an on-going situation where you have information
11 about this child or what the child wants, about the mom
12 and the dad, and now you just represent the dad.
13 That's a big conflict. We don't have that here.

14 Judge, I was appointed as her guardian ad litem.
15 I don't have any confidential information on Alice Shaw
16 Baker because she had 24 hour care. Every time I met
17 with her, I met with her with somebody else. Any time
18 I got information from her, I provided it to the court.
19 In fact, I stand by every single attachment that's in
20 here.

21 I was charged with visiting her. I was charged
22 with checking up on her, making sure she -- she loved
23 --

24 THE COURT: What about her argument that it
25 affects her client because she's possibly an heir to

1 the estate?

2 MR. KOUTEN: I -- I don't see how that affects her
3 -- well, yeah, it does as a potential heir to the
4 estate --

5 THE COURT: Right. Right.

6 MR. KOUTEN: Because as -- during my term as
7 guardian ad litem, it was revealed that Alice Shaw
8 Baker had a last will and testament. The Probate
9 Court, at the final appointment hearing, asked that the
10 last will and testament be turned over to the court,
11 which they did.

12 When Alice Shaw Baker died, they turned the
13 original of that will over. Now there's an allegation
14 by Attorney Fisher, who was in her fiduciary capacity
15 as guardian and conservator, says at some point Alice
16 Shaw Baker -- who, by the way, was incapacitated on all
17 seven grounds in the State of South Carolina -- she
18 couldn't contract, she couldn't -- they allowed her to
19 have \$50 a week -- she indicates that Alice revoked the
20 will.

21 But then they turn it over the court. If you
22 look at the statute, well, if you are going to revoke
23 the will, you've got to obliterate it, tear it, burn
24 it, all of the things that weren't done.

25 Not to mention the problem that you have with

1 alleging that and not telling anyone, including the
2 court that said, whoa, wait a second now, she's saying
3 that she doesn't want to do this after -- after the
4 fact. I think the problem that we have here is that
5 when you have an attorney, who doesn't have an adverse
6 position, and is walking step in step with what the
7 decedent wanted and knows what the decedent wanted, and
8 that's different from what they want, then they need to
9 ask me to be removed. Judge, there is no conflict
10 here. I'm not in conflict with anybody.

11 Everybody who signed on as defendants under my
12 representation -- and don't get me wrong, Judge,
13 looking at this kind of hindsight 20/20 thing, probably
14 that was a mistake, but I didn't understand it. I
15 didn't understand that there would be a TRO filed
16 against the personal representative.

17 I didn't understand that the modification that I
18 sought and was granted, allowing the personal
19 representative to do administrative duties, because the
20 original order said temporary restraint from all
21 things, leaving her in a position to be derelict in her
22 duty. The modification was granted. Yeah, you can do
23 administrative things.

24 Appeal to the three judge panel of the SC Court
25 of Appeals, we prevailed. Appeal to the full panel of

Received
3-7-2014

1 State of South Carolina
Common Pleas
2 County of Charleston

3
4 2009-CP-10-03010

5 _____
6 BETTY FISHER, et al,
7 Plaintiff(s),

8 vs. Transcript of Record

9 BESSIE HUCKABEE, et al,
10 Defendant(s).
11 In Matter of Alice Shaw-Baker.

12 _____

13
14 October 8, 2013
15 Charleston, South Carolina

16
17 B E F O R E:
18 The Honorable J.C. Nicholson

19
20 A P P E A R A N C E S:
21 Lisa Fisher, Esquire
John Hughes Cooper, Esquire
22 Attorney for the Plaintiffs

23 Peter A. Kouten, Esquire
Attorney for the Defendant

24
25 Mona L. Manley, Official Circuit Court Reporter

1 the action on behalf of Alice Shaw-Baker. We
2 contend that pursuant to the statute that the
3 significant difference in the wrongful death
4 statute and the surviving, the survival action
5 indicates that a real representative can bring
6 the action.

7 The real representative in this case is
8 Betty Fisher as the living relative of Alice
9 Shaw-Baker, and it also includes the legal
10 malpractice action against Mr. Kouten. Now,
11 those are the main points that we wanted the
12 Court --

13 THE COURT: All right. Well, tell me what
14 you say is still outstanding. Removing
15 Mr. Kouten was one, right?

16 MS. FISHER: Yes.

17 THE COURT: What else?

18 MS. FISHER: Our motion for --

19 THE COURT: Your Plaintiff's motion,
20 right. What else is still outstanding?

21 MS. FISHER: Well, outstanding is our
22 motion to alter and amend the --

23 THE COURT: All right. But removing
24 Mr. Kouten from this companion case on the will
25 contest, is that what you say is still

1 outstanding?

2 MS. FISHER: Yes, Your Honor.

3 THE COURT: Okay. All right. What else?

4 MS. FISHER: And a ruling on our Motion to
5 Alter and Amend in light of the fact that the
6 Court has granted the Motion for Summary
7 Judgment.

8 THE COURT: Okay.

9 MS. FISHER: And our contention is that
10 the Motion to Alter and Amend mandates that the
11 Court reverse the dismissal of the --

12 THE COURT: If I remember correctly the
13 question, I thought the legal question was who
14 was the real representative under the statute,
15 if I remember correctly.

16 MS. FISHER: I believe that's one of the
17 issues.

18 THE COURT: I came to the conclusion that
19 Betty Fisher was not the real representative,
20 if I remember correctly. Okay?

21 I understand the short order doesn't say
22 that, but if I remember correctly that was the
23 issue, the main issue before the Court at the
24 time of the summary judgment motion.

25 MS. FISHER: Yes, Your Honor.

1 THE COURT: Is that correct?

2 MS. FISHER: That's correct.

3 THE COURT: Okay. Now, you want me to
4 revisit that and renew -- look at that again;
5 is that correct?

6 MS. FISHER: I do.

7 THE COURT: Okay. Let me hear from him.

8 MR. KOUTEN: Thank Your Honor. May it
9 please the Court?

10 Peter Kouten for the Estate of Alice
11 Shaw-Baker.

12 Your Honor, the main issue with this case
13 is a will, and whether a will is valid or not
14 valid. Ms. Shaw-Baker died in 2009. That
15 matter has not been heard. In this complaint,
16 the complaint that was filed --

17 THE COURT: Well, what's the status of the
18 will contest at this point? Is it still in
19 probate court or appeal or what?

20 MR. KOUTEN: That matter has been removed
21 to the circuit court.

22 THE COURT: Okay.

23 MR. KOUTEN: And that is still held in
24 abeyance for I have no earthly idea why, Judge.
25 We entered into a scheduling order and really

1 And we would ask that that hold the way it is
2 today, Judge.

3 In addition to that not --

4 THE COURT: One issue that I didn't
5 address in the short order was whether the
6 order was to be with prejudice, without
7 prejudice. What's your position on that?
8 That's what I'll address on short order -- this
9 action, the 1332 action.

10 MR. KOUTEN: Yes, sir. Yes, sir.

11 THE COURT: In your request you ask it be
12 dismissed without prejudice, and I did not
13 address that in the order.

14 MR. KOUTEN: And in that note, that was
15 the Court's alternative thrown into which way
16 it could go, either by summary judgment or
17 Motion to Dismiss. Certainly we pled both,
18 Your Honor, Motion for Summary Judgment or
19 Motion to Dismiss until such time as they can
20 prove they have standing.

21 So, if the Court does decide that that
22 would be a better alternative, we would support
23 the Motion to Dismiss giving them an
24 opportunity to come back when they have
25 standing.

1 THE COURT: All right. Ms. Fisher.

2 MS. FISHER: Your Honor, first and
3 foremost before I even get into the --

4 THE COURT: Well, let me ask you a
5 question. How long are you going to be here
6 from California? Are you here for a while, or
7 are you just here and back out or what?

8 MS. FISHER: I'm just here, and then I'm
9 going back. Is there a reason you want us back
10 at an earlier date, Your Honor?

11 THE COURT: No. Go ahead, let me hear
12 your reply.

13 MS. FISHER: Before I reply to that, there
14 was a couple of issues that I don't want there
15 to be waiver on. There was a Notice of
16 Association by Mr. Will's that was filed in
17 this case, Your Honor.

18 MR. KOUTEN: Objection, Your Honor.

19 THE COURT: Let me hear her, then I'll
20 hear from you.

21 Go ahead.

22 MS. FISHER: Okay. We filed an objection
23 to Mr. Will. And the reason that I'm bringing
24 this up to the Court is because if he's
25 representing the other parties, then not all

1 THE COURT: Okay. All right. Go ahead.

2 MS. FISHER: So, our Notice of Association
3 and our objection to Mr. Will's presence,
4 Mr. Kouten is standing here today representing
5 all Defendants; is that correct?

6 THE COURT: I think that's what he just
7 told me.

8 MR. KOUTEN: Judge, first, if I may, we --
9 my objection is based on the fact that we're
10 here today reviewing the prior order, and that
11 prior order has nothing to do with what Sandra
12 Burke, Bessie Huckabee, or Kay Passailague did
13 subsequent to that hearing. This has to do
14 with revisiting whether she has standing or
15 not.

16 If it would please the Court, the attorney
17 representing the beneficiaries is here, and
18 he's sitting behind the ref. He can certainly
19 move forward if you like, but today he really
20 has no reason to be up here, Judge.

21 THE COURT: Okay. All right. Thanks very
22 much.

23 Anything else, Ms. Fisher?

24 MS. FISHER: Yes, Your Honor. Okay.

25 Then in regard to the Motion for Summary

1 Judgment, this indicates that Respondents are
2 the party. This is a case with Betty Fisher,
3 not Lisa Fisher, Betty Fisher acting and
4 seeking to address the rights of Alice
5 Shaw-Baker as her real representative. So for
6 clarity, it's not Lisa Fisher, it's Betty
7 Fisher.

8 Our respondents are all respondents
9 including Mr. Kouten, which it's very unclear
10 from this pleading whether or not Mr. Kouten is
11 included in this. There was a legal
12 malpractice action against him, which is
13 separate and aside from the issue of real -- of
14 the omnibus act.

15 Mr. Kouten indicates that the issue in
16 this case is about validity of the will.
17 That's not the issue in this case.

18 The issue in this case is about the elder
19 abuse of Alice Shaw-Baker and who can bring
20 that action. Well, Bessie Huckabee, as one of
21 the named Defendants, certainly is not going to
22 bring this action. So, there has to be an
23 alternative person who can bring that action.
24 And we believe as to viable action, if the
25 survivor statute indicates that a real

1 representative is the heir. We've cited case
2 law to it.

3 It is old case law, but Mr. Routen's
4 conclusion that this has anything to do with
5 real property rights, 1700s, 1800s, again is
6 only his conclusion. That's not the law. The
7 law is clear that someone has to be able to
8 preserve the rights for Bessie Huckabee.

9 The statute would have grown had Ms.
10 Fisher not filed this action. It would have
11 grown, go past to the omnibus act and to the
12 legal malpractice action.

13 The will contest is in and of itself is
14 not just a will contest; it's a petition for
15 removal of Bessie Huckabee. So, that action
16 certainly needs to be decided.

17 It's not -- we didn't file our motion to
18 amend to stop that action from being heard, but
19 the issues regarding disqualification,
20 regarding the elderly, that is all critical,
21 and we have a consent scheduling order which
22 indicates that the will contest won't be heard
23 until after our motions are decided.

24 So, to present this in any kind of way
25 that we're somehow not having this Court

1 hearing is false. They consented to the
2 scheduling order, and they're bringing up
3 issues which are irrelevant.

4 The fact of the matter is, we are making
5 an argument regarding the real representative
6 in this action, and the real representative
7 cannot be Bessie Huckabee. Bessie Huckabee
8 would not bring an action against herself.

9 And the only way for this Court to secure
10 and protect those rights so there's no
11 prejudice is to make sure that Betty Fisher is
12 able to secure the action.

13 Now, whether or not the elder abuse action
14 will be heard prior to this will contest,
15 that's not before the Court. All we're saying
16 is we filed the motion to secure the action,
17 and according to the law, according to our
18 expert declarations, according to our other
19 declarations, there's --

20 THE COURT: Well, in my opinion the bottom
21 line is who has the right to bring a survival
22 action. Okay?

23 MS. FISHER: Yeah.

24 THE COURT: The personal representative,
25 or as you say, a real representative. And

1 that's the bottom line.

2 MS. FISHER: Okay.

3 THE COURT: And that was to my opinion.

4 That's the sole issue that was before the
5 Court, whether a real representative could
6 bring the survival action versus a personal
7 representative. You got a personal
8 representative that's been appointed in probate
9 court, they haven't been removed.

10 So to me that's the sole issue in this
11 case. I'm not talking about the will contest
12 or anything else, or removing him, I'm just
13 talking about the issue on the summary
14 judgment. And I was of the opinion that the
15 real representative didn't have the authority
16 to bring the survival act, it had to be the
17 personal representative.

18 Now, tell me why I'm wrong on that.
19 That's what I want to hear. It's very narrow.

20 MS. FISHER: You've got it.

21 With regard to that, the only person who
22 could bring the action is -- assuming
23 Mr. Kouten's position is correct, would be
24 Bessie Huckabee. Now, that's up against public
25 policy as well as against what the statute

1 says.

2 THE COURT: But isn't the proper thing to
3 do is to go to probate court, have her removed
4 because she fails to do her duty; i.e., file a
5 survival action, and ask someone to be
6 substituted? Not just to walk into Court, and
7 then you got two representatives, a real
8 representative, a personal representative.

9 MS. FISHER: I don't think so, Your Honor,
10 and I'll tell you why.

11 THE COURT: Okay.

12 MS. FISHER: The personal representative,
13 she's entitled to a hearing. That action has
14 been filed. That action will be decided at
15 some point, and we are -- that's a separate
16 issue.

17 The real representative, there's nothing
18 in the statute that indicates that a person
19 can't bring an action against the personal
20 representative in the capacity of the real
21 representative status.

22 And the Legislature certainly could have
23 been as specific as the Legislature was in the
24 wrongful death action, which I included, I
25 believe, in my supplemental memorandum.

1 THE COURT: But it's a survival action,
2 not wrongful death.

3 MS. FISHER: Right.

4 THE COURT: And we're talking about the
5 survival statute. Okay.

6 MS. FISHER: In wrongful death. Give me a
7 second.

8 In the wrongful death, it specifically
9 says the administrator or personal
10 representative.

11 THE COURT: Right.

12 MS. FISHER: But in the survival action it
13 says the personal representative or the real
14 representative. That means that the
15 Legislature at least considered that there
16 would be circumstances where a personal
17 representative was not the appropriate person
18 to bring the action, and they're -- and
19 furthermore, the fact of the matter is if you
20 allow the personal representative not to go
21 forward with actions against herself, and
22 actions against -- on her counsel, then you
23 have a public policy problem where the rights
24 of the decedent are abolished.

25 THE COURT: What you ought to do, in my

1 opinion, is to go to probate court and have her
2 removed.

3 MS. FISHER: But you can't have her
4 removed since there's a pending action on that.
5 There's a pending action on the entirety of the
6 case, Your Honor. And all I'm saying is to
7 secure her rights, Betty Fisher can stand and
8 receive -- there could be substitution of --

9 THE COURT: I mean, I understand why the
10 personal representative is not going to sue
11 herself for actions that she took in the estate
12 or during the life of the deceased. I
13 understand that. I guess the question is
14 procedure.

15 How do you -- how do you do what you want
16 to do. Okay?

17 MS. FISHER: And I think to protect Alice
18 Shaw-Baker's right, and due to the statutory
19 language --

20 THE COURT: Well, what rights would she
21 have? Unless the will is set aside, how would
22 she have any rights?

23 MS. FISHER: Well, it has nothing to do
24 with the will.

25 THE COURT: I know, but what rights does

1 she have to even bring the survival action when
2 you got a will leaving everything to someone
3 else?

4 MS. FISHER: Well, okay. Alice
5 Shaw-Baker, we're talking about Alice
6 Shaw-Baker's rights.

7 THE COURT: Right.

8 MS. FISHER: And Alice Shaw-Baker, our
9 position is she suffered abuse during her
10 lifetime.

11 THE COURT: Right.

12 MS. FISHER: And that means the damages
13 are to Alice Shaw-Baker. And, now, whoever
14 inherits those damages, that's a different
15 issue.

16 THE COURT: Well, is it really? I mean,
17 your client is not included in the will, are
18 they?

19 MS. FISHER: Well, no.

20 MR. KOUTEN: No, Your Honor.

21 THE COURT: So, the bottom line, even
22 though you have the right to bring the lawsuit,
23 you're not the beneficiary under the survival
24 statute. Whoever received the benefits under
25 the will. I mean, I don't know, I haven't seen

1 the will, and I haven't seen that file, but
2 that's the person that would benefit from it.

3 MS. FISHER: Yes, Your Honor. And our
4 position is that the individual is entitled to

5 --

6 THE COURT: So unless that will's set
7 aside your client is not going to benefit from
8 the survival action, period.

9 MS. FISHER: And she's not attempting to.
10 The lady -- and our position, the money is
11 supposed to go to --

12 THE COURT: Who's going to benefit from
13 the survival action?

14 MS. FISHER: We believe that upon our
15 resolution of the will contest and the removal
16 action, that the money will go --

17 THE COURT: Right. Well, that's just what
18 I said. You going to have to attack the will
19 before there's any benefit to your client.

20 MS. FISHER: It's not about benefit to our
21 client.

22 THE COURT: Well, why would it -- if you
23 stand to bring the lawsuit when you have no
24 damages?

25 MS. FISHER: It's because -- it's not

1 about our damages. That's what I'm trying to
2 get included, sir.

3 THE COURT: Well, it's about your damages
4 because you're going to inherit the survival
5 action of pain and suffering that they incurred
6 during the illness or whatever. And you're not
7 going to inherit any of that. So how do you
8 have standing?

9 MS. FISHER: We have standing to represent
10 the rights of Alice Shaw-Baker. Alice
11 Shaw-Baker, the decedent, her money -- our
12 belief, as set forth in our will contest, is
13 that all of the moneys are to go to animal
14 charities, Your Honor. So, you have to have
15 someone who has authority to bring the action
16 for Alice Shaw-Baker so that it goes to her
17 intentions.

18 Now, you're right. It should have.

19 In the conclusion of the will contest, it
20 goes to Bessie Huckabee's -- it doesn't go to
21 Bessie Huckabee, for clarity Your Honor, she is
22 not the beneficiary under the will.

23 THE COURT: Who is?

24 MS. FISHER: Kay Slade.

25 THE COURT: Who is?

1 MS. FISHER: Kay Slade, who was
2 purportedly a friend of Alice Shaw-Baker's, who
3 at the time was supposed to run an animal
4 rescue. This is a very complicated case.

5 But what we're trying to tell this Court
6 is that if you look at it strictly from a
7 procedural aspect, there has to be someone to
8 protect the rights of Alice Shaw-Baker. Bessie
9 Huckabee is not in a position to do that.

10 The Valley is an heir, The Valley is a
11 beneficiary in the event that the will is
12 disregarded and/or animal charity provision is
13 not accepted by the Court.

14 So, Alice Shaw -- Betty Fisher is left
15 standing to bring the action as will
16 representative. The Court does need to
17 conclude who is going to benefit. In fact, the
18 Court should not conclude that.

19 The Court should protect the rights of
20 Alice Shaw-Baker, that who caused her to suffer
21 is entitled to be sued. And resolution will be
22 for another day, Your Honor. I'm asking you to
23 look at the standing issue from the statute.
24 As real representative, Betty Fisher has that
25 standing.

1 THE COURT: Okay. Thank you so very much.

2 MS. FISHER: Thank you.

3 THE COURT: You wanted to say something?
4 I said I would ask you to tell me after she
5 finished.

6 MR. KOUTEN: Thank you, Your Honor.

7 And I believe I heard at least twice that
8 all these issues are ancillary, all these
9 issues that are piling down to this Court. One
10 of the returns from the probate court is 800
11 pages. There are two Defendants who were sent
12 over twice.

13 THE COURT: Well, the problem -- let's
14 assume that the State does have an action
15 against in this case. But it's against the
16 personal representative. So the personal
17 representative, obviously, is not going to
18 bring the lawsuit against herself.

19 And I guess -- I guess if there's an
20 action pending in probate court to have her
21 removed --

22 MR. KOUTEN: There is, Your Honor.

23 THE COURT: -- and that hasn't been heard?

24 MR. KOUTEN: It has not, Your Honor.

25 THE COURT: So let's assume for a minute

1 that she is removed and it is about a survival
2 action. Then, now, if I dismiss it at this
3 point in time, the statute of limitations has
4 run. It's almost like you got the cart before
5 the horse. Y'all are here in this case, when
6 you need to get into probate court and resolve
7 the issues about who is the true personal
8 representative of the estate.

9 MS. FISHER: That's correct, Judge.
10 Because what they -- what counsel just said was
11 that that doesn't fit into the procedural
12 aspect of what we are trying to do.

13 THE COURT: And I hate to kick her out of
14 court when I know the statute of limitations is
15 running and you got another case pending out
16 there that hasn't been heard.

17 Now, why y'all did a scheduling order to
18 hear this one first, I don't know.

19 MR. KOUTEN: Make no mistake, Judge, all
20 the actions that we see here are part and
21 parcel to actions she's already brought. She's
22 brought --

23 THE COURT: Well, what's wrong with
24 consolidating both of them, and y'all go get it
25 heard, both of them at the same time?

1 MR. KOUTEN: We would ask that the Court
2 entertain our motion that was timely filed, ten
3 days, prior to this hearing, for exactly that,
4 to hear the will contest.

5 THE COURT: But why hear the will separate
6 from this? Why can't both of them be heard at
7 the same time? Consolidate the two?

8 MR. KOUTEN: It's a standing issue, Judge.
9 It's a standing issue.

10 THE COURT: Well, I understand that. But
11 if I take the position now that the real
12 representative can't bring the action -- which
13 I did in the short order, okay, I can see
14 that -- then there's no action. It's gone.
15 And then if they are successful in removing her
16 and then get appointed a personal
17 representative, so is survival action because
18 the statute's right.

19 MR. KOUTEN: But, Judge, she didn't ask
20 for that.

21 In her petition, number one --

22 THE COURT: Well, I know she didn't ask
23 for that. Just because she didn't ask for it
24 doesn't mean I can't order it.

25 MR. KOUTEN: Well, what she asked for was

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Published Opinion No. 5371
Heard October 14, 2015 -- Filed December 9, 2015

Appellate Case No. 2014-000175
Circuit Case No. 2012-CP-10-1332

BETTY FISHER, as Real Representative
for Alice Shaw-Baker.....Petitioner

v.

Bessie Huckabee, Kay Passailague Slade,
Sandra Byrd, and Peter Kouten, and Does 1 through 100, Defendants

Of whom Bessie Huckabee, Kay Passailague Slade, Sandra Byrd,
and Peter Kouten Respondents

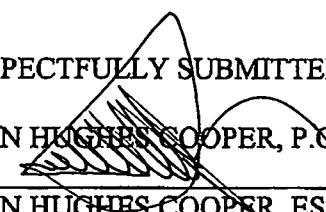
CERTIFICATE OF COUNSEL

I certify that this Appendix complies with Rule 242(e) by containing all materials therein
required and not any other material.

February 19, 2016

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

1476 Ben Sawyer Blvd. Ste. 71

Mount Pleasant, SC 29464

shiplaw@jhcooper.com

843-883-9099; fax 843-883-9335

ATTORNEY FOR PETITIONER